AN ELEMENTARY TREATISE

ON

THE COMMON LAW,

FOR

THE USE OF STUDENTS.

BY

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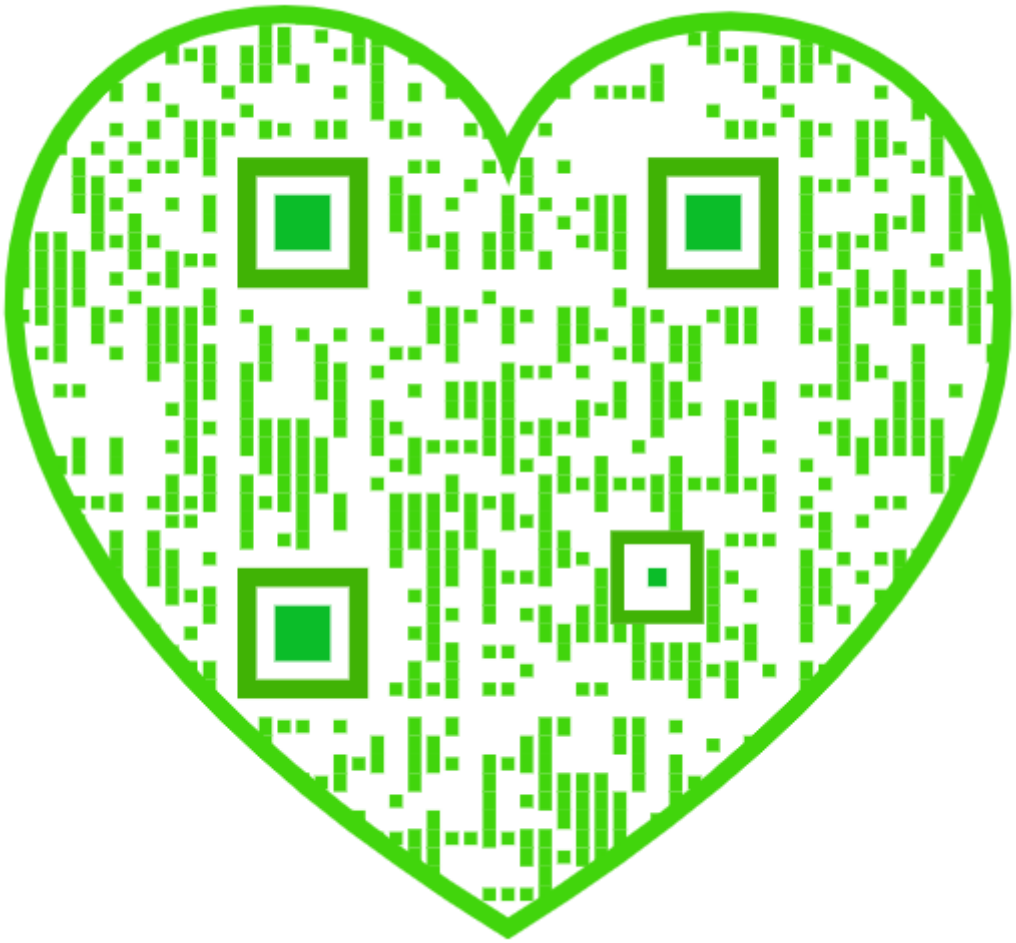

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PREFACE TO THE FIRST EDITION.

The uses of an introductory book upon Law are:—

1. To explain to the student the meanings of legal terms and conceptions. I have found it convenient in this work to make free use of certain expressions which, though used to some extent by writers on General Jurisprudence, are not yet fully domiciled in the technical terminology of the Common Law, and also to introduce a few terms of my own coinage. These last I have pointed out by footnotes explaining that they are not in common use. The student will therefore understand that he will not meet with those expressions in other law books.

2. To furnish to the student a systematic arrangement of the entire law, showing its different parts and their relations to each other. The Common Law has suffered greatly from the want of scientific arrangement, and, as is stated in the text, no authoritative or generally accepted arrangement as yet exists. The arrangement presented in this work must be taken simply as the one that commends itself to the author. In the private substantive law of normal persons its principal basis is the conception of protected rights and the distinction between such rights and other kinds of rights and duties, which seems to me of great importance; but the student must bear in mind that he will not meet with it elsewhere.

3. To enable the student to acquire such an outline knowledge of the whole law as is necessary to enable him to take up the study of special topics and to read the reports and statutes intelligently. It is impossible to study any branch of the law in detail without some knowledge of all other branches, and especially to understand the modern law without knowing something of the old law. The Common Law must be studied historically. The old law everywhere underlies the new, and occasionally crops up to the surface in unexpected places. This is why so much space has been given to rules and principles which are now obsolete.

Those are the ends which in writing this book I have had in view. It is written with reference to the ordinary course of instruction in Law followed in the University with which I have at present the honor of being connected and in the American Law Schools. Therefore certain topics which do not need to be understood as preliminary to the study of others, or which are generally taken up early in the course, are touched upon lightly, while others of less intrinsic importance, but which either need to be known at the outset or may not be met with at all except in a work of a general character, are accorded a space out of proportion to their relative importance. The law of contracts, negotiable instruments and shipping may serve as examples of the former class of subjects, and the feudal rules as to seizin and the old common law procedure of the latter.

This book is written primarily for students in Japan, but with the hope that it may be found useful to American students also. Some things have been put in which would have been omitted and some subjects treated less fully than they would have been had it been written for either exclusively. The necessity of getting the work into a single volume has compelled me to omit a good deal of matter, mostly illustrative and historical, which I would gladly have put in, and sometimes to make use of vague and general statements where precise details would have been better.

In treating of the laws of some forty odd jurisdictions, which differ to some extent in their unwritten portion and very greatly in that part which is statutory, it is of course impossible to mention all the different rules. Such expressions in the text as "generally," "usually," "in most places" are sometimes used to indicate the existence of such local differences, and sometimes mean that exceptions or qualifications to rules and principles exist which for brevity's sake have to be passed over without special mention. It may be proper to warn the student that he does not know much law when he has merely read, or even mastered, an elementary book.

I have not cited many authorities, because it seems to me that notes and citations are apt rather to confuse than to aid a beginner. A student in any subject must take his first book on

trust; criticism and the investigation of original authorities come later. Where I have employed the exact words of another, I have indicated it by quotation marks, except sometimes in the case of Blackstone's Commentaries, which I have regarded as a mine in which any one is at liberty to dig, and have used freely.

Tokio, June 1898.

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INTRODUCTION.

CHAPTER I.

LAW IN GENERAL.

Law and order.

1. The one idea that is common to all meanings of the word law is that of order or regularity in the happening of events. This is the whole meaning of law in the scientific sense. A scientific law is a mere formula, a statement that events do in fact happen thus and so, *e.g.* that bodies gravitate towards one another with a force that varies directly as their masses and inversely as the square of their distance.

Scientific laws.

Law in the jural sense.

2. Law in the jural sense involves at least the further notions that the events in which order manifests itself are the acts of rational beings, and that the order is produced by their attempts to make their conduct conform to an ideal standard or rule. In its most rudimentary form, as it exists among the lowest savages, the conception of law seems to contain nothing more than this. There is not necessarily any distinct belief as to the origin of the rules which prevail or the reasons for obeying them, nor is it anybody's business in particular to enforce them. In a more advanced state of society the magistrate appears, whose special function it is to compel obedience to the law; and thus the idea of force is added to that of order. At first the ruler is not usually regarded as himself the author of the laws which he enforces. These are looked upon as existing independently of his will or that of the community, sometimes as being of divine origin.[1] The final development of the jural idea of law in this direction is reached when it is recognized

Order and force.

[1] The theory of the law of nature, which the Roman jurists borrowed from the Greeks (§ 30), and which played so important a part in the juridical and political speculations of the eighteenth century, is partly a survival of this archaic conception of law and partly the result of a confusion between the scientific and the jural notions of law. This latter confusion is still very prevalent.

as having its birth in the will of a human lawgiver, by whom it can be changed.

Law has developed in another direction by becoming differentiated from other bodies of rules with which it was at first confounded, such as the precepts of religion and morality. The kind of law which is made by political rulers and administered in courts is called municipal law.[2]

Municipal law.

3. It is plain that no single adequate definition of municipal law can be given, because the word does not always stand for the same thing. That which is called law in a civilized state is very different from the law of a barbarous tribe. It is convenient to denote them both by the same name, because they present many of the same characteristics and serve largely the same ends. But a definition which would accurately fit the one would be too large or too small for the other. Any one therefore who seeks to define law must frame his definition according to the purpose for which he wants to use it. The student of general jurisprudence needs a very comprehensive definition, that will cover every thing that any where or in any period has been called law; but a writer who confines himself to the highly developed law of a civilized state must narrow his definition correspondingly. For this latter purpose Austin's famous definition is believed to be correct: municipal law is a rule of conduct set by a sovereign to his subjects; or as it is expressed by Prof. Holland: "A general rule of external human action enforced by a political sovereign."[3]

Definitions of law.

Austin's definition.

4. The sovereign, for legal purposes, is the supreme law-making authority in a state; *i.e.* that person or body of persons who can directly make any changes in the law which they please.[4] In England the legal sovereign is the Parliament; in the United States, those legislative bodies mentioned in § 121 who acting in concert can amend the national constitution; in an absolute monarchy, the monarch. The legal sovereign may in fact be subject to a power behind the throne mightier than himself. Thus in both England and the United

The sovereign.

[2] From Latin *municipium*.

[3] Holland, Jurisprudence 27.

[4] In monarchical countries the name sovereign is also used to denote the king or emperor.

States the voters who elect the members of the sovereign legislative bodies can control the actions of the latter and shape the laws to their own pleasure. Therefore it is often said that in those countries the people are sovereign. And that is true and of the utmost importance in a political sense, but not in a legal sense.[5]

5. There can be no legal limitation on the power of the sovereign, because his will is the only source of law. Therefore there can not be an irrevocable or irrepealable law; for the same sovereign authority that decreed that the law should never be changed can repeal that decree. The constitution of the United States forbids a state to make any law impairing the obligation of contracts. If therefore a state should make a law which amounted to a contract, it could not repeal that law without the consent of the other contracting party; but that is because the state governments are not sovereign. Irrepealable laws.

It follows also that a law is not void because it is unjust or injurious, and courts have no right to refuse to enforce a law on such grounds. Laws of course ought to be just and beneficial; but these are matters for the consideration of the legislature when it makes the law, not of the courts, whose duty is to enforce the law as they find it. Unjust laws.

6. Law is prescribed by the sovereign, that is, commanded. A command is an expression of the will of the person giving it accompanied by an express or implied threat that he will inflict a penalty for disobedience or use force to compel obedience. The penalty or force threatened is called the sanction of the command or law. Without a sanction the expression of the sovereign's will is mere advice or request, and not in the proper sense a law. The American constitutions contain some provisions of this kind, for instance the direction in the national constitution that Congress shall cause a census to be taken every ten years, which there is no way to compel Congress to do. Nevertheless it is usual and convenient to call such directions laws when they are enacted in the form of laws. Command. Sanction.

[5] Austin's division of governments into monarchies, aristocracies and democracies, accordingly as the sovereign is a single person, a class of persons or the whole people, seems to be founded on a confusion between the political and legal sovereignty, and to be of no great value.

Direct and indirect legislation.

7. The sovereign may make laws directly or may delegate to others the power to do so in his name. In England the sovereign body, Parliament, is also the ordinary law-making body; but in the United States the national Congress and the state Legislatures are not sovereign but exercise a delegated authority. The will of the legislator to make a law may be declared expressly in words or inferred from his conduct; that is, a law, like a contract or most kinds of juristic acts, may be express or implied. Customary law is of the latter sort; it is not originally ordained by the sovereign, but is accepted by him and enforced by his courts with his acquiescence. As Hobbes truly says: "The legislator is he, not by whose authority the law was first made, but by whose authority it continues to be a law."

Express and implied legislation.

Customary law.

Territorial jurisdiction.

8. The sovereign can only prescribe rules to his own subjects; the laws of any state generally have no operation outside of its territorial limits. But all persons and things in a country, even temporarily, are for the time being subject to its laws. If a foreigner commits a crime in a country he is punished according to its laws, even though his act would be lawful in his own country; and if he makes a contract there, its validity is usually determined by the *lex loci contractus*. But to this principle there are a few exceptions.

Extent seaward.

Governments do sometimes extend their jurisdiction outside of their territorial limits. Seaward the territory of a state generally reaches one marine league from the shore, though some large bays and gulfs whose mouths are more than two leagues across, such as Chesapeake bay, are considered to belong to the nations who own their coasts. Beyond the three mile limit lies the high sea, which is common to all. But every nation exercises jurisdiction over its own ships and all persons on them at sea, and even in foreign ports so far as the local authorities do not interfere. The American courts have punished crimes committed by foreigners on American vessels on the high seas and in the territorial waters of other nations, and doubtless would take cognizance of offences of American citizens in places where there was no regular government. Some states go further, and attempt to control to some extent the conduct of

Jurisdiction at sea.

Jurisdiction in foreign countries.

their own subjects everywhere. Thus the French law requires marriages of French citizens wherever made, in order to be valid in France, to be celebrated according to its forms.

When rights, duties or capacities created by the law of one state come into question before the courts of another, those courts, by virtue of what is called comity between nations, will sometimes apply the principles of the foreign law. Thus the rightfulness or validity of an act done in England might be judged in an American court by the English law. The rules for determining what law shall govern in such cases form the subject matter of a branch of the law known as the conflict of laws or private international law. Comity. Conflict of laws.

9. International law, also called the law of nations or *jus gentium*,[6] is a set of rules or principles which civilized nations habitually observe in their dealings with each other and each other's citizens and subjects. As between states it can hardly be called law in the full sense, there being no sovereign over nations to make or enforce the law, so that their observance of it is purely voluntary. But so far as the courts of any nation apply its rules for deciding controversies between individuals it is a part of the law of that nation. International law.

10. Law is a rule, that is, a general command. It commands that in certain circumstances, whenever those circumstances exist, certain acts shall or shall not be done. A law is thus distinguished from a specific command addressed to a specific person and relating to specific acts. A judgment of a court that A pay a sum of money to B or a warrant from a magistrate for the arrest of A, though it is a command of the sovereign, is not a law. Law is a rule.

Law is also a rule of conduct, or as some authorities prefer to say, of outward conduct. It deals with acts, not with mere thoughts or states of mind. The state of a person's mind is sometimes taken account of by the law, but only when it affects his conduct. A rule of conduct.

11. Law is divided into written law (*lex scripta, jus scriptum*) and unwritten law (*lex non scripta, jus non scriptum*). Written and unwritten law.

[6] The original meaning of *jus gentium* was different; see § 29.

Written law. The former is that law which is expressly enacted by legislative bodies or public officers having legislative powers, and which therefore at its origin is put into precise written form. The enactments of the British Parliament and of the national Congress and state Legislatures in the United States are called acts or statutes. Before the name statute came into general use, that is, up to about the reign of Edward I, and to some extent later, the written laws corresponding to statutes were called charters,[7] constitutions, provisions, ordinances or assizes. Treaties with foreign nations have the force of statutes, and, together with written constitutions, are often included under the name of statutory law. Other kinds of written laws are designated by such names as orders, rules, regulations, ordinances, by-laws, rescripts, edicts, decrees or proclamations. These may be made in some cases by the chief executive, or by other officers or subordinate legislative bodies such as city councils or town meetings.

Statutes.

Treaties and constitutions.

Other written laws.

Public and private statutes. 12. Statutes are general or special, public or private. "A general or public act is a universal rule that regards the whole community," or relates to classes of persons. A special or private act is one that confers rights or imposes duties on particular persons, such as a statute changing a person's name or authorizing a particular corporation to increase its capital stock. A private law is called in Latin *privilegium;* but the English word privilege is confined to such private acts as are beneficial to the person to whom they relate, or is used to denote a right conferred by such a statute. A bill of attainder is a private statute by which a person supposed to be guilty of an offence is condemned to punishment by the act of the legislature instead of being tried and sentenced by a court. Bills of attainder are prohibited by the constitution of the United States and have long been disused in England, being regarded as unjust.

Privileges.

Bills of attainder.

Judicial notice of statutes. Courts take judicial notice of public statutes; that is, are presumed to be acquainted with their existence and contents, so that it is never necessary to offer to the court any proof on

[7] Charter (*carta*) means a deed or written instrument; but many of the charters granted by the early kings were really laws, *e.g. magna carta.*

those points.[8] But it is otherwise with a private statute, which must be proved, unless the statute itself directs the courts to take notice of it.

Declaratory and remedial statutes.

13. A declaratory statute is one that does not make any change in the law, but merely restates the existing law for the sake of greater clearness and certainty. Remedial statutes do change the law; and accordingly as they operate to enlarge or restrict the scope of some former rule they are known as enlarging or restraining statutes. An enabling statute is one authorizing the doing of an act which would otherwise be unlawful or legally void, *e.g.* permitting two railroad companies to consolidate.

Enabling statutes.

Retrospective statutes.

A retroactive or retrospective statute is one that affects the validity or legality of past acts, for instance one which declares that a contract which was void when made shall be valid. A retrospective law is not necessarily unjust; indeed validating statutes, by which acts previously done which were void are confirmed and made binding, are often passed in the interest of justice. But it is presumed by the courts that a statute is not intended to be retrospective, and it will not be construed to be so, but will be confined in its operation to future acts, unless it expressly declares itself to be so or will not reasonably admit of any other construction. An *ex post facto* law is a retrospective statute that punishes as criminal an act that was lawful at the time when it was done or increases the punishment for a past unlawful act. Such statutes are now regarded as unjust, and are forbidden in the United States by constitutional provisions.

Validating statutes.

Ex post facto laws.

Mandatory and directory statutes.

A mandatory statute is one that peremptorily commands or forbids an act, so that anything done in opposition to it is illegal and may be void. A directory statute merely directs how a certain act ought to be done; but either it is not imperative, so that the act may be valid if done in some other way, or there is no provision for its enforcement, as in the case mentioned in § 6. Generally such a statute creates merely an imperfect duty.[9]

[8] If a judge is actually ignorant of anything of which he is required to take judicial notice, he may inform himself in any manner, *e.g.* in the case of a private statute by consulting a statute book.

[9] See § 257.

When statutes take effect.

14. Formerly in England a statute took effect from the first day of the session of Parliament at which it was passed, the entire session being deemed for legal purposes to have been held on that day. But in modern times statutes do not go into operation until after a certain interval of time, unless the statute itself provides otherwise.

Repeal.

15. If two laws are inconsistent, the later one prevails and the earlier is repealed by it. The same principle applies to an inconsistency between two parts of the same statute. A repeal may be express or implied. The former occurs when the later law mentions the earlier one and in terms declares it repealed; the latter when two laws conflict without any intention being explicitly declared in the later one to repeal the earlier. But two different laws covering the same ground are not necessarily inconsistent. If both are affirmative and can stand together, there is no implied repeal of the first by the second. Thus a law giving a new remedy for a wrong does not generally take away the old remedy, but the injured party may have either at his option. If a law that has repealed another is itself repealed, the original law revives; but in some places this rule has been abolished.

Effect of repeal.

The repeal of a law does not affect any rights that have been acquired under it by individuals. Thus if Congress should repeal the law which allows persons to settle upon the public lands of the United States and acquire homesteads in it, that would not devest the rights of previous settlers. But if a law making an act criminal is repealed, past violations of it which have not yet been punished are thereby condoned.

Construction of statutes.

16. Most of the rules of construction which apply to other written documents apply also to written laws. These will be mentioned in another place. But the following are peculiar to laws.

Strict and liberal construction.

A statute is said to be construed strictly when it is not extended to cover anything that is not clearly within its express words. If there is any doubt as to whether a certain matter is embraced in it, that must be considered to be excluded. Liberal construction means that the words of the statute are o be taken in a wide sense, so as to include everything that may

fairly be presumed to have been within the intention of the legislator though not expressly put down. Thus in an old case, by an excessive strictness of construction, a statute imposing a penalty for stealing a horse was held not to apply to the theft of a mare. On the other hand, the clause in the constitution of the United States empowering the national government to coin money has been thought by some, by a very liberal construction, to authorize the issue of paper money which in the strict sense can not be coined.

Penal statutes.

Penal statutes, that is, those that impose penalties for doing acts, and statutes in derogation of common right, for instance those which place restrictions upon the carrying on of lawful trades or confer special and exclusive privileges upon particular individuals, are to be construed strictly, though not with unreasonable strictness so as to defeat their obvious intent.

Laws against fraud.

Laws for the prevention of fraud, so far as they are not penal, *e.g.* where they do not provide for punishing the offender but merely make the fraudulent transaction invalid, are to be liberally and beneficially construed so as to effectuate the intention of the lawgiver.

Remedial statutes.

In construing remedial statutes three points are to be considered, the old law, the mischief and the remedy; that is, how the law stood before the passage of the statute, what mischief or evil arose from that condition of the law, and what remedy the legislature intended to provide. And the judge should so construe the act as to suppress the evil and advance the remedy. The meaning of the statute as thus evolved is called the equity of the statute; and a case may fall within the equity of the statute and be governed by it which is not covered by its exact words.

Equity of a statute.

Construction with regard to justice.

Although, as has been said, an unjust or injurious law is not invalid, yet it is an established rule of construction that the courts will not presume that the legislature intended to act unjustly or foolishly. Therefore if a statute is fairly capable of two meanings, one of which makes it unjust or harmful and the other just and beneficial, the latter construction is to be preferred.

Unwritten law.

17. Unwritten law was not originally enacted in written form by any legislative authority; or if it was, the enactment has been lost or is no longer regarded as authoritative. Thus the various partial codifications of the English law made before the Norman conquest, such as the laws of Ethelbert, of Alfred the Great or of Cnut, have not now the force of written law. So far as the rules contained in them are now binding, they are so because of their having been adopted into the unwritten law. The same is true in the United States of English statutes enacted before the separation of the American colonies from the mother country. There are various old English statutes which now form part of the unwritten law in most of the United States, *e.g.* the statutes of *quia emptores*[10] and of uses.[11]

English statutes in the United States.

Customs.

The unwritten law consists mainly of rules originating in custom but adopted and developed by the courts by what is called judicial legislation, the nature of which will be presently described. It has been called by Bentham and other writers after him judge-made law.

General customs.

18. Customs are either general or particular. General customs make up the bulk of the common law;[12] and new ones from time to time arise and are admitted into the law.

New customs.

A new custom does not become a part of the law, or at least can not certainly be known to be so, until it has been adopted as such by the courts. But when a custom has arisen in the community and is generally observed and regarded as binding, the courts will sooner or later take judicial notice of it and enforce it as law.[13] Thus the first settlers in the western part of the United States where water was scarce found it necessary to adopt very different rules regarding the use of it for mining and irrigation from those of the common law which prevailed in the east; and those customs have been recognized as law and acted upon by the courts. So the inventions of banks, railroads and telegraphs have led to the introductions of many new customary rules into the law.

Customs not having the force of law.

But a custom which has not in itself the force of law may

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[1] See § 458. [11] See § 508. [12] See § 35.

[13] In England special juries of merchants are sometimes summoned to inform the court as to mercantile customs.

in certain cases furnish a rule of decision to the courts. For instance where parties make a contract in the course of a particular kind of business they are presumed, unless they express a contrary intention, to contract with reference to the established usages of that business, and those usages may be referred to to explain the meaning of their contract when that is doubtful. So when a question arises whether a person has acted reasonably in a particular situation, the fact that people in like situations generally do or do not act so may be of importance. But such customs or usages are not taken judicial notice of by the courts, but have to be proved in each case.

Two classes of customs.

Two classes of customs must therefore be distinguished, namely, those that have the force of law, with which persons must comply, and of which the courts take judicial notice, and those that are not *per se* binding but may be voluntarily adopted by parties in particular transactions or referred to in particular cases, and whose existence has to be proved.

Particular customs.

19. Particular customs are those that prevail in particular places only. Although the general customs that made up the common law were nearly uniform in all parts of England, there were certain localities which preserved peculiar customs of their own. Thus in Kent the custom called gavelkind prevailed, by which instead of a man's eldest son only being his heir his land descended to all his sons equally. In order to be valid such a local custom must have existed from immemorial antiquity, from a "time whereof the memory of man runneth not to the contrary," as the common phrase goes.

In the United States.

In the United States there are very few, if any, such particular customs. The customary laws of the various states do indeed differ from each other in some points; these however are not particular customs in the legal sense, but each state has its own common law consisting of its own general customs.

Precedents.

20. Since a law is a fixed rule and not the arbitrary will or private opinion of the judge, it follows that the application of the rule to similar cases ought to give like results. Therefore it is a principle of the English and American law that the decision of a court upon a question of law becomes a pre-

cedent and ought to be followed and conformed to whenever the same question arises again. If judges decide the same point now one way and now another, confusion and uncertainty will result. It is better as a general rule that a question once decided should be considered as settled forever; *stare decisis*. The decision of a court however is not itself law, but only evidence of what the law is; it is possible that a judge may err and give a wrong decision. Therefore a single decision is not always binding as a precedent; if it is plainly and clearly wrong, another court or the same court upon another occasion may refuse to follow it. In that case it is said to be overruled.[15]

Overruling decisions.

Rules as to precedents.

21. The principal rules in regard to the effect of a decision as a precedent are as follows.

Decisions appealed from.

When an appeal is taken from a lower to a higher court the decision of the lower court in that same case is not a precedent in the higher court, the very object of the appeal being to reverse that decision.

Decisions of the highest court.

A decision of a court of last resort is absolutely binding as a precedent upon all inferior courts. A lower court should not attempt to overrule such a decision, even though the judge is perfectly sure in his own mind that it is erroneous. Should he do so, his attempt would be in vain, since the higher court on an appeal would reverse his judgment.

Decisions of an inferior court.

A decision of a lower court in another action is a precedent in a higher court, but is of comparatively little weight; the higher court will overrule it if it thinks it incorrect.

Decisions of the same court.

A decision of the same court or one of equal rank is a precedent, and should not be overruled even though it seems to the court to have been wrongly decided, unless its incorrectness is very clear. But in very plain cases even the highest courts will occasionally, though rarely, overrule their own previous decisions.

Cumulative precedents.

When a decision has been several times followed, so that

[14] There is a difference between reversing and overruling a decision. It is reversed when, in the same action, an appeal is taken to a higher court, and the appellate court annuls the judgment of the lower and orders a different judgment to be given. It is overruled when, in a different action, the same or another court refuses to follow it as a precedent; but this does not affect the validity of the former decision as between the parties to the suit in which it was rendered.

a "chain of precedents" has been established, these will very seldom be overruled, however sure the judges may feel that the original decision was wrong. *Communis error facit jus.* "This is shocking," said Chief Justice Mansfield, speaking of a certain old decision, "but it has been followed in a hundred cases;" and he refused to overrule it.

Decisions of foreign courts are not precedents. For this purpose in the United States the national courts and those of the several states are all regarded as foreign to each other. But when a question of national law arises in a state court the decisions of the national courts are precedents, and conversely the decisions of a state court are precedents in a national court on a point of state law.

Decisions of foreign courts.

22. On deciding a case the judges, especially in the higher courts, usually file written opinions containing the reasons for their decision. The opinion is no part of the decision, is not required by law to be given, and is not strictly authoritative. It is the decision, not the opinion, which is a precedent. But the opinion is often of great value as explaining the scope and meaning of the decision and the principles on which it rests. The discussion in the opinion ought to be confined to the questions of law necessarily involved in the decision. Expressions of opinion upon other points are called *dicta* or *obiter dicta*, and are of less weight.

Opinions of judges.

Dicta.

23. The development of the unwritten law has been chiefly by means of precedents. This process is called judicial legislation. Theoretically it is not legislation at all; the duty of courts is not to make law but to administer the law. The legal theory is that the law is complete and perfect, having a rule provided beforehand for every case that can possibly arise, and that what the court has to do is to find, if necessary to interpret, and to apply the existing rule. But even legitimate interpretation may involve judicial legislation. The necessity of interpretation at all implies that the law is doubtful, that there are two possible rules that might be applied; and the effect of the interpretative decision of the court is the establishment of one rule as correct and rejection of the other.

Judicial legislation.

Interpretation.

When there is a statute or a precedent applicable to the case in hand and so plain as not to require interpretation,[15] the court in fact does nothing more than to enforce the existing law. But cases sometimes come before the courts which are really novel, combinations of facts not fairly within the scope of any established rule or existing precedent. In such cases the court, not being permitted to refuse to decide, must necessarily make a new rule, and, the decision becoming a precedent, the rule so evolved is thenceforth a part of the law. The new rule, as will be presently explained, must follow the analogy of some existing rule or principle, so that the process of finding such a new rule closely resembles that of the interpretation of an old one. Indeed, the rules of the unwritten law not existing in any fixed form of words but having to be gathered from a comparison of the precedents, it is often practically impossible in a given case to say with certainty whether what the court is doing is the interpreting of an old rule or the making of a new one. It is because of this resemblance and uncertainty that the courts have been able to exercise the power to make new rules under cover of the fiction of interpretation.

New rules.

Method of judicial legislation.

24. But this fiction or theory that he is merely interpreting confines the law-making power of the judge strictly within limits. He can not make any sort of a rule that he pleases, as the legislature can. He must appear to interpret. He must deduce his new rule logically or analogically either from some existing rule or at least from some acknowledged principle that underlies some existing rule. There is a difference between a rule or principle of law and a principle of justice or policy to carry which into application the rule of law is made. Thus the general principle that a judge ought to be impartial is easily distinguishable from the specific statutory rule that a judge shall not sit in a case in which one of the parties is his near kinsman; the principle that a person's last will ought to be made with some publicity as a

Principles of law and of policy.

[15] When one case is like another that has been previously decided, so that the earlier one furnishes a precedent precisely in point for the later one, the two are commonly said to go "on all fours" with each other.

precaution against fraud, from a rule of positive law that it must be attested by two witnesses. But in the unwritten law it is often difficult to distinguish one kind of principle from the other, and the possibility of judicial legislation is partly due to the confusion between them.

Authorities.

In deciding a case for which there is no existing rule, and for which therefore it becomes necessary to make a new rule, the judge considers such precedents as seem to afford principles or analogies on which the desired rule can be framed so that it shall harmonize with the already existing law. If several alternative principles or analogies present themselves, he will or may resort for guidance to the decisions of foreign courts, the *dicta* of judges or the opinions of individual jurists or text writers, all of which in such doubtful cases, though not strictly authoritative, have more or less weight and influence, often having practically almost the force of precedents. This is especially true of decisions of foreign courts proceeding under the same system of law. English decisions are cited in American courts and American ones in English courts, and the various courts in the United States rely much upon each other's views of the law. The judge may also in such cases allow weight to considerations of justice and expediency, and these will often turn the scale when authorities are lacking or conflict.

Considerations of justice.

CHAPTER II.

THE CIVIL AND COMMOM LAW.

The civil law.

25. The two principal systems of law in the world are the civil law and the common law. The former prevails in the states of western continental Europe, that is, in most of the Christian countries that formed part of the Roman empire, in countries originally colonized from them, such as Mexico and the Central and South American republics, and also, though much modified by the influence of the common law, in Scotland, the state of Louisiana and the province of Quebec in Canada, the last two having been formerly French colonies. Since the introduction of the new codes, whose materials have been drawn mainly from German sources, Japan may be added to the list of civil law countries.

Roman law.

The civil law is founded upon the law of Rome, though in its modern form there are mingled in it many elements of more recent origin, and there are diversities in details between different countries.

The Twelve Tables.

26. In the fifth century B. C., because of the demand of the plebeians at Rome that the laws, knowledge of which had up to that time been a monopoly of the patricians, should be published in writing, a commission of ten men, *decemviri*, was appointed, who drew up on ten panels or tables, to which two more were soon afterwards added, a brief code of laws, which were posted up in the forum. This law of the Twelve Tables became, in theory at least, the foundation of that part of the Roman law which was known as the civil law in the narrower sense, *jus civile*, or *jus quiritium* or *quiritarium*.[1] Only fragments of the XII Tables have come down to us.

Roman written law.

Besides the XII Tables the written law of Rome comprised under the republic laws enacted by the senate, the assembly of

[1] From *Quirites*, an old name of the Roman people.

the centuries (*comitia centuriata*) and that of the tribes (*comitia tributa*), which kinds of laws were known respectively as *senatus consulta*, *leges* and *plebicita*, and also under the empire the constitutions, rescripts and decrees of the emperors.

Tho edict.

27. The edict of the praetor seems also to be properly ranked among written laws. The judge, or the principal judge, at Rome was the praetor, who was elected annually. Each praetor on taking office published an edict (*edictum*), in which he announced the principles upon which he would administer justice. Although the praetor had no recognized legislative power, and the edict perhaps in theory dealt only with rules of procedure in his court, yet the praetors in fact made their edicts the means of introducing important modifications into the law.

It was customary for each praetor to re-issue his predecessor's edict with such additions as he thought fit, so that it received the name of the perpetual edict. In the reign of Hadrian, the edict having become very long and disorderly in its arrangement, the praetor Salvius Julianus re-arranged and systematized it, after which no more additions were made to it and it was known as the edict of Julianus.

Roman unwritten law.

28. The unwritten law of Rome was developed in a different manner from that of England and America. The decisions of the courts were not regarded as precedents. What took the place of precedents were the opinions of the juris-consults (*jurisconsulti*) or lawyers, which were called *responsa prudentum*, answers of the learned. These were opinions delivered by the juris-consults by way of advice upon particular cases propounded to them, and preserved in their own note books or those of their pupils or embodied in treatises on law.

Responses of juris-consults.

Comparison of Roman and English methods.

Since an imaginary case was as good for this purpose as a real one, and so cases for decision could be multiplied at pleasure, the method of developing the unwritten law by means of responses tended to a more rapid and also a more systematic development than the method of judicial legislation by precedents, under which latter a point may remain in doubt for a long time before an actual case arises in which it can be decided, and then the judge must confine his decision to the very point in issue in the particular case without generally

having the opportunity, which the Roman juris-consult had, of taking a comprehensive view of the whole branch of the law to which the case belongs. On the other hand, the decision of a court has the great advantage over the response of a juris-consult of being rendered after argument by counsel. This is of so great importance that in some of the United States where the legislature has the right to call for the opinion of the judges upon the constitutionality of a proposed law, the judges have been very reluctant to give opinions when they have not had the opportunity of first hearing arguments. At Rome each juris-consult being free to express his own opinion, there was a good deal of conflict among their views and therefore a good deal of uncertainty in the law. After the time of Augustus the juris-consults were even divided into two schools, the Proculeians and the Sabinians, who differed from each other in many important respects. Under the system of precedents there has been no such thing as schools of jurisprudence among American and English lawyers.

School of jurisprudence.

In theory the responses were merely interpretative of some authoritative legal text, such as the XII Tables or the edict. They claimed for themselves, and theoretically they had, no legal authority at all. But practically they were followed by the courts, the opinion of any particular juris-consult having more or less weight according to his standing aud reputation. From the time of Augustus certain distinguished juris-consults were specially authorized to give responses in the emperor's name. The most celebrated of the juris-consults were Gaius, Papinian, Ulpian, Paulus and Modestinus, all of whom flourished after the reign of Hadrian. The Commentaries of Gaius, a systematic treatise on the law, have been preserved to us.

Authority of the responses.

Leading juris-consults.

29. The original civil law, *jus civile*, was exclusively for Roman citizens; it was not applied in controversies between foreigners. But as the number of foreigners increased in Rome it became necessary to find some law for deciding disputes among them. For this the Roman courts hit upon a very singular expedient. Observing that all the surrounding peoples with whom they were acquainted had certain principles of law in common, they took those common principles as rules of deci-

Jus gentium.

sion for such cases, and to the body of law thus obtained they gave the name of *jus gentium*. The point on which the *jus gentium* differed most noticably from the *jus civile* was its simplicity and disregard of forms. All archaic law is full of forms, ceremonies and what to a modern mind seem useless and absurd technicalities. This was true of the law of old Rome. In many cases a sale, for instance, could be made only by the observance of a certain elaborate set of forms known as mancipation; if any one of these was omitted the transaction was void. And doubtless the laws of the surrounding peoples had each its own peculiar requirements. But in all of them the consent of the parties to transfer the ownership for a price was required. The Roman courts therefore in constructing their system of *jus gentium* fixed upon this common characteristic and disregarded the local forms, so that a sale became the simplest affair possible.

Law of nature.

30. After the conquest of Greece, the Greek philosophy made its way to Rome, and stoicism in particular obtained a great vogue among the lawyers. With it came the conception of natural law (*jus naturale*) or the law of nature (*jus naturae*); to live according to nature was the main tenet of the stoic morality. The idea was of some simple principle or principles from which, if they could be discovered, a complete, systematic and equitable set of rules of conduct could be deduced, and the unfortunate departure from which by mankind generally was the source of the confusion and injustice that prevailed in human affairs. To bring their own law into conformity with the law of nature became the aim of the Roman jurists, and the praetor's edict and the responses were the instruments which they used to accomplish this. Simplicity and universality they regarded as marks of natural law, and since these were exactly the qualities which belonged to the *jus gentium*, it was no more than natural that the two should to a considerable extent be identified. The result was that under the name of natural law principles largely the same as those which the Roman courts had for a long time been administering between foreigners permeated and transformed the whole Roman law.

Double system of rights.

The way in which this was at first done was by recognizing

two kinds of rights, rights by the civil law and rights by natural law, and practically subordinating the former to the latter. Thus if Caius was the owner of a thing by the civil law and Titius by natural law,[2] the courts would not indeed deny up and down the right of Caius. They admitted that he was owner; but they would not permit him to exercise his legal right to the prejudice of Titius, to whom on the other hand they accorded the practical benefits of ownership; and so by taking away the legal owner's remedies they practically nullified his right. Afterwards the two kinds of laws were more completely consolidated, the older civil law giving way to the law of nature when the two conflicted. This double system of rights in the Roman law is of importance to the student of the English law, because a very similar dualism arose and still exists in the latter,[3] whose origin is no doubt traceable in part to the influence of Roman ideas.

Corpus juris civilis.

31. In the reign of the emperor Justinian the famous codification of the Roman law known as the *corpus juris civilis*, or more commonly simply as the *corpus juris*, was made by a commission of jurists appointed by that emperor. This consists of the Digest or Pandect's in fifty books, made up of extracts from the writings of eminent juris-consults, chiefly though not exclusively the five above named, arranged under suitable heads, and the twelve books of the Code containing the imperial constitutions. These were finished about A.D. 533, and to them were afterwards added later enactments of the emperors under the name of Novels. The codifiers also prepared an elementary text book for the use of students, called the Institutes. In the *corpus juris* the amalgamation of the old civil law and the natural law is complete.

The Institutes.

The glossators.

32. The glossators were jurists of the middle ages, principally belonging to the law school of Bologna, who wrote commentaries on the *corpus juris* in the form of annotations or glosses. They as well as the modern writers on the civil law are called civilians.

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[2] The former was said to be *dominus* or quiritarian owner, the latter to be bonitarian owner or to have the thing *in bonis*.

[3] That of "legal" and "equitable" rights. See § 38.

33. The Roman law was never accepted in England. Indeed for some centuries it was regarded with much disfavor there, as being associated with the unwarrantable claims of the popes and the usurpations and oppressions of the ecclesiastical courts. When Vacarius, a Lombard from the school of Bologna, attempted to lecture on the Roman law at the university of Oxford in the reign of Stephen, he was silenced by a royal order. Nevertheless the English churchmen continued to study the Roman law, and as most of the lawyers in ancient times were churchmen, there is no doubt that the English law has been enriched by borrowings from that source. As to how extensive those borrowings were there is much difference of opinion among scholars. The technical terminology of the English law is largely Latin; but it by no means follows that when a Latin name is used the thing for which it stands is of Roman origin, and many of the Roman technical terms appear in the English law with altered meanings. The weight of opinion now seems to favor the view that the English law, particularly that part of it which is known distinctively as the common law,[4] is mostly of native growth and the Roman element in it small.

The Roman law in England.

34. Besides the meaning above explained, the expression civil law is also used in a *quasi* negative sense to signify that the kind of law to which in the particular case it is applied is distinguished from some other kind; for instance:

Other meanings of civil law.

As opposed to other sorts of law, such as the laws of morality or honor, to denote law in the technical sense, municipal law.

As opposed to the criminal law, to denote that part of the law which does not relate to crimes; thus wrongs are divided into crimes and civil injuries.[5]

As opposed to military and martial law, to denote the ordinary law; thus a person who does not belong to the army or navy is called a civilian.

As opposed to ecclesiastical law, to denote that part of the law which relates to secular matters; thus in ancient times

[4] See § 35. [5] See § 278.

when a person had been condemned as a heretic by the ecclesiastical courts, he was handed over to the civil authorities for punishment.

As opposed to international law, to denote the law of a particular state. In this sense the expression municipal law is better.

The common law.

35. The other great system of law, the common law, is of English origin, and now prevails in England, Ireland, the United States, Canada, and the principal English possessions.

The name common law has the following meanings.

Meanings of common law.

1. The entire English or Anglo-American system of law, as opposed to the civil law. This is the sense in which it is used in the title of this book.

2. The old common law, that is, the ancient customary law of the English people, as opposed to written law and to those parts of the law which are of more recent growth or not mainly of English origin.

3. The modern common law, which has been developed out of the old common law by the process of judicial legislation. It is not possible however to draw any hard and fast line between the old and the modern common law; the one passed gradually into the other in the course of time.

4. In civil law countries the common law means the Roman law, *i.e.* that general basis which the jurisprudence of all of them has in common.

Subdivisions of the Anglo-American law.

36. The present Anglo-American law is made up of five parts or subdivisions, namely: (1) That part which is called by way of distinction Law, (2) Equity, (3) The Maritime law, (4) The Ecclesiastical law, (5) Military law.

Each of these consists partly of unwritten or customary, and partly of written law. In all except the last the unwritten element is by far the larger and more important part.

Law.

37. Law in the special technical sense above mentioned comprises (1) the common law much modified by statutes, and (2) the mercantile law, law merchant, *lex mercatoria*, or *jus mercatorium*. The latter is founded upon the customs of merchants. It does not however, like the commercial codes of some European countries, comprise the whole of

Mercantile law.

the laws relating to mercantile transactions. Those are mainly governed by the common law. Sale and agency for instance are frequent transactions in trade, but they fall mostly under the dominion of the common law. The mercantile law consists of a small collection of rules relating chiefly to a few subjects, for which, the common law furnishing no sufficient rules, the courts fell back for principles of decision upon the practices which they found prevailing among merchants. The most important of those subjects are bills of exchange, promissory notes and marine insurance, all of which contracts are of comparatively modern origin and were introduced into England from the continent of Europe, so that the mercantile law is largely an importation from civil law countries, and in many points follows civil law principles. In a certain loose sense however the name mercantile law is sometimes applied to all that part of the law which relates to trade and commerce.

Equity.

38. Equity is a supplemental system of law which grew up by a peculiar process of judicial legislation[6] by the side of the common law to supply certain deficiences which were found to exist in the latter. It differs from law in two respects.

Equitable rights; trusts.

First, equity recognizes and protects certain rights of which the law takes no notice. These are called equitable rights or trusts. When equitable and legal rights conflict, the equitable right prevails. Thus if property is given to A in trust for B, A becomes the legal owner of the property and is the only person whose rights are recognized at law. But equity will compel him to hold and exercise his legal right exclusively for the benefit of B, who is the equitable owner. This double system of rights resembles that of the Roman law, and indeed the relation between law and equity is closely analogous to that between *jus civile* and *jus naturale*.

Equitable remedies.

Secondly, equity in many cases enforces legal rights, which would also be enforceable at law, by giving different remedies. Thus a contract is binding at law, creates a legal right; but if one party breaks his agreement, the other has no remedy at law but to sue for pecuniary damages.

[6] See § 191. *et seq.*

Equity however will sometimes interfere and specifically enforce the contract by compelling the party to do the very thing that he has agreed to do. So at law there is generally no remedy against a wrong till it has actually been committed; but equity often grants an injunction to prevent a threatened wrong.

Maritime law.

39. The maritime law is a body of rules relating to ships and commerce by sea, though the common law also furnishes some rules on those subjects. It is derived from the customs of seafaring men and merchants, not only of England but of other nations. Like the mercantile law therefore it is largely of foreign origin. This part of the law is nearly the same all over the world, and contains a large element of Roman law.

Ecclesiastical law.

40. The English ecclesiastical law consists of two parts. The first part deals with the organization, doctrine and discipline of the church of England, which is established by law as the state church. This is ecclesiastical law in the proper sense. In the United States there is no established church, and therefore no ecclesiastical law of this sort. Churches in the United States are mere voluntary associations, and come under the ordinary law. What is there called ecclesiastical law is merely the rules which those bodies have adopted for their own government, which in their legal aspect amount to contracts between their members.

In the proper sense.

Probate, administration, marriage, divorce.

The second part of the ecclesiastical law comprises the law relating to the probate of wills and the appointing of administrators for the estates of deceased persons, and a portion of the law of marriage and divorce. The church claimed, and in former times was permitted to exercise, an extensive jurisdiction over the last two subjects on the ground that marriage was a sacrament. How the subjects of probate and administration, which have no sacred character, happened to fall under its jurisdiction will be explained in another place.[7]

In the United States.

In the United States marriage and divorce are regulated mainly by the rules of law, the principles of the old ecclesiastical law being admitted only to a very small extent. Probate and ad-

[7] See § 658.

ministration together with a few other subjects still form a partially distinct body of law, having no specific name, which is committed to the care of a separate set of courts.

Canon law.

The ecclesiastical law is based mainly upon the canon law,[8] the law of the Catholic church; though the canon law as such and in its entirety has never been admitted as authoritative in England. That law was derived partly from the Roman law and partly from the ecclesiastical legislation of the popes. In the year 1151 Gratian, an Italian monk, made a compilation of it in three books, known as the *decretum Gratiani*, to which in later times various popes added constitutions, or regulations, of their own. These make up the *corpus juris canonici*.

Military law.

41. Military law is the law which governs the army and navy or the militia when in active service. It exists in time of peace as well as of war. It is mainly statutory. It must be distinguished from martial law, which latter is indeed hardly to be called law at all. Martial law exists when for military reasons, for instance in case of the military occupation of an enemy's territory, the ordinary law is to a greater or less extent put into abeyance and the arbitrary authority of the military commander substituted for it. In many countries the government has power even in time of peace to suspend the ordinary law and proclaim martial law or, as it is often called, a state of siege, in the country at large or in particular places, putting them temporarily under military rule, when in its opinion special dangers threatening the state or the public safety, such as insurrection, require it. But this is not allowed in the United States or England.

Martial law.

Classes of courts.

42. The different kinds of law above mentioned are administered in five classes of courts, namely: (1) courts of law or of common law; (2) courts of equity or chancery; (3) courts of admiralty, which administer the maritime law, and are so called because anciently the Admiral was the judge; (4) ecclesiastical courts or courts Christian, or in the United States courts of probate; and (5) military or naval courts, courts martial.

[8] From Greek *κανών*.

Civil law courts.

The courts of equity and admiralty and the ecclesiastical courts or courts of probate are called the civil law courts, because the procedure in them is, or was, according to the forms of the civil law and very different from that of the common law courts.

American law.

National and state law.

43. There are also two divisions of the law which are peculiar to the United States, namely, into national and state law, and into constitutional and ordinary law. The national law is that which exists by the authority of the national government and is enforced mainly in the national courts. It is also called federal law. State law exists by the authority of the several states of the Union, and is usually enforced in their courts.

Constitutional law.

Special American sense.

Constitutional law has two meanings. In its ordinary sense it denotes that part of the law which regulates the form of the government and the appointment, titles, powers and functions of the principal legislative and executive officers. In the special American sense constitutional law is that part of the law which is contained in the written constitutions of the United States and of the several states and the decisions of the courts interpretative of these.

BIBLIOGRAPHICAL NOTE.

Statute books.

44. Statutes are published by the state in books known as statute books, usually one volume for each session of the legislature. These are called statutes at large or session laws. "The Statutes of the Realm" is the name of an official edition of the English statutes from the earliest times to the end of the reign of Queen Anne, published during the reign of George III. In the United States it is customary to have revisions of the public statutes made from time to time by persons appointed for that purpose, obsolete and repealed acts being omitted and inconsistences harmonized. Such a revision amounts to a codification of the existing statutory law. The statutes as so revised are contained in books entitled Revised Statutes or General Statutes.

Naming and citation of statutes.

Statutes are usually named and cited by the date of their passage, in England by the regnal year of the monarch, and the number of the chapter and section, as: "Acts of 1896, c. 12, § 20" or "50 & 51 Vict., c. 2, § 12." Revised statutes are cited as such, for instance: "Rev. Stat. of U. S., § 2572." But some ancient statutes are named from the place where they were enacted, as the statutes of Westminster or of Gloucester; and occasionally statutes receive other names, such as the "statute of frauds" or "Lord Campbell's act."

45. The unwritten law is found in books of reports and treatises on law. The former contain the decisions of the courts which are precedents. Reports.

A report of a case must be distinguished from the record or official history of it which is kept by the clerk of the court and remains in the archives of the court. The report should contain only so much of the substance of the record as is necessary to show the exact point decided, and the decision itself. The opinion of the judge, if there is one, is usually added, although that is not a part of the decision or of the record. Reports are either official or private. Any one is at liberty to publish a book of reports, and a private report is as good as an official one, because, the courts being always assumed to know the law, the object of referring to a report is simply in theory to refresh the judge's memory. The official reports extant are as follows.

English. The "Year Books" were published by the prothonotaries or chief clerks of the higher courts, one volume annually with a few omissions, from the time of Edward II to that of Henry VIII. They are in Norman-French, as are some others of the old reports. The "Law Reports" have been published since 1865 by the Incorporated Council of Law Reporting, and are divided into a number of separate series named after the different courts, or since the Judicature Act of 1873, after the divisions of the High Court of Justice. English official reports.

American. The "United States Reports" contain the decisions of the Supreme Court of the United States since 1873. The volumes published before that date bear the names of the reporters. The official reports of the highest state courts are named after the state. In most of the states there were earlier private reports, and these have sometimes been taken into the official series and sometimes not. The official reports of the lower courts, when there are any, bear the name either of the reporter or of the court. American official reports.

The private reports are very numerous. They are usually named from the reporter, but sometimes have other names. Private reports.

The Year Books are cited by the letters Y. B. and the regnal year and name of the king; the Law Reports by the letters L. R. followed by the number of the volume in the series and the name of the series, except that in citing the recent series named from the divisions of the High Court the letters L. R. are usually omitted, and in the volumes since 1890 the date is put in instead of the number of the volume. Of other reports the citation is by the number of the volume and the name of the report, except that those of Chief Justice Coke are generally cited by way of eminence simply as Reports, and Chief Justice Croke's by the name of the author and of the king or queen in whose reign they were issued. Certain conventional abbreviations are used for the names of the reports, which must be learned by practice. The following examples will illustrate the manner of citation. Citation of reports.

Y. B. 4 Edw. III = The Year Book of the Fourth Year of Edward III.

L. R. 5 Ch = Law Reports, Chancery Appeals series, Vol. 5.

9 Q. B. D. = Law Reports, Queen's Bench Division series, Vol. 9.
(1895) App. Ca. = Law Reports, Appeal Cases series, the volume for 1895.
2 Rep. = Coke's Reports, Vol. 2.
Cro. Jac. = Croke's Reports, reign of James I.
100 U. S. = United States Reports, Vol. 100.
52 N. Y. = New York Reports, Vol. 52.
10 Blatchf. = Blatchford's Reports, Vol. 10.
1 M. & W. = Meeson & Wellesby's Reports, Vol. 1.
3 Mod. = Modern Reports, Vol. 3.

Names of cases.

The cases contained in the reports are usually entitled from the names of the parties with the word "against" (agst.) or the Latin word "*versus*" (*vs. v.*) between them. Thus "Smith v. Jones" means the case of Smith against Jones. But sometimes they are named from only one party or in other ways, for example: "Shelly's Case," "In the Matter of Jones," "In re Jones," "The Nitroglycerin Case" "Ex parte Smith."

Sources of the unwritten law.

46. For the ancient unwritten law reports are scarce, and other sources have to be relied upon. Some collections of laws prior to the Norman conquest have been preserved, and side lights may occasionally be obtained from similar old laws of other Teutonic tribes on the continent of Europe, for instance the Salic laws.

Domesday Book.

Domesday Book contains the results of an official inquiry made under William I for fiscal purposes into the ownership of the land of the kingdom.

Pipe Rolls.

A few old records have also been published, the most important of which are the pipe-rolls containing the accounts of the Exchequer[9] or fisc for a considerable period, beginning in the reign of Henry I. A collection of common forms of writs[10] was made in the reign of Edward III., and is known as the old *Natura Brevium*. A similar collection called *Registrum Brevium* was published officially in 1531; and in 1534 Judge Fitzherbert put out his New *Natura Brevium* containing selections from the older works.

Natura Brevium.

But the chief sources of our knowledge of the old law are legal treatises, among which the most important are the following.

Dialogus of the Exchequer.

Dialogus de Scaccario, is a short treatise in the form of a dialogue on the law and practice of the Exchequer, composed in 1178 or 1179 by Richard Fitz-Nigel, afterwards bishop of London, who was treasurer of the Exchequer for forty years. It is printed in Stubbs's Select Charters.

Glanvill.

Tractatus de Legibus et Consuetudinibus Regni Angliæ, was written between 1187 and 1189 by Ranulf Glanvill, chief justiciar under Henry II. It treats of the procedure in the King's Court.

Bracton.

De Legibus et Consuetudinibus Angliæ, in five books by Henry Bracton (whose name is also spelled Bratton or Briton), a judge of the King's Court under Henry III., is in form, like the older work of Glanvill, an exposition of the law and practice of that court but in effect an extensive treatise on the common law. The author uses freely the terminology and classifications of the civil law, and many of the technical Latin terms now in use were probably introduced into the common law by him.

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[9] See § 74. [10] See § 180.

Fleta, sive Commentarius Juris Anglicani, is a kind of abridgment of Bracton's work with certain additions, written about 1290 by an unknown author in the Fleet prison, from which it takes it name. Fleta.

A work in French on the Laws and Customs of England, composed in the reign of Edward I, is ascribed to an author named Britton, or Bretton, of whom nothing is known with certainty. It goes over more briefly nearly the same ground as Bracton and draws much of its material from him. Britton.

Mirrour aux Justices is the work of Andrew Horne, Chamberlain of London in the reign of Edward II. Its contents are partly historical, partly critical. Mirror of Justices.

Sir John Fortescue, who became chief justice of England under Henry VI, wrote a work entitled *De Laudibus Legum Angliæ*, in which he compared the English with the Roman law and pointed out the advantages of a constitutional monarchy over an absolute one. Fortescue.

Thomas Littleton, or Lyttleton, a judge under Edward IV, was the author of a work on Tenures, which in time came to be regarded as almost authoritative and, together with Coke's commentary upon it presently to be mentioned, remained the standard work on that branch of the law. Littleton.

Doctor and Student, in the form of a dialogue between a doctor of theology and a student of law, treats of the general principles underlying the common law. It was written in the reign of Henry VIII by Christ. St. Germain. Doctor and Student.

The Institutes of the Laws of England, by Chief Justice Sir Edward Coke, who stands in the very highest rank of English jurists, appeared in 1628. They consist of four parts. The first is a commentary on Littleton's Tenures, and is generally known as Coke upon Littleton. Part second is a commentary upon *magna carta* and certain other ancient statutes; and the other two parts deal respectively with criminal law and the constitution of the courts. Coke's Institutes.

Sir Matthew Hale, judge in the Court of Common Pleas during the protectorate, wrote a History of the Common Law, a History of the Pleas of the Crown,[11] and an Analysis of the Common Law, the arrangement of the last of which was followed by Blackstone in his Commentaries. Hale.

Certain old works known as Abridgements contain brief summaries of points decided by the courts, extracted from the reports and grouped under heads. The best known of them are Fitzherbert's, Bacon's, Comyn's and Viner's. They are much esteemed and formerly were very often cited, but in modern times are seldom referred to. Abridgments.

47. Modern books on law are without number. Only a few of the most important can be noticed here.

Probably the most famous law book in the English language is Blackstone's Commentaries on the Law of England. Sir William Blackstone, afterwards a judge of the court of Common Pleas, was appointed in 1758 Blackstone.

[11] See §179.

Vinerian professor of English law in the university of Oxford, and his great work was founded upon the lectures that he there delivered. It is a systematic treatise on the common law designed for the use of law students and educated people generally. Ever since its publication it has remained without a rival as an institutional work, and the great majority of English and American lawyers from that time to the present day have begun their legal studies with its perusal.

Kent. Kent's Commentaries, which probably ranks first in reputation among American works on law, consists, like Blackstone's Commentaries, of academical lectures. Its author, James Kent, after being Chief Justice and Chancellor of the State of New York, was appointed in 1823 professor of law in Columbia College. The Commentaries appeared about 1826. They are of the same nature as Blackstone's, but adapted especially to the needs of American students.

Bentham. Jeremy Bentham, who wrote between 1776 and 1831, was the author of many books on the principles of morality, government, legislation and topics connected with jurisprudence. Though not technically law books, his works were much read by lawyers and their effect upon the development of the law has been very great.

Austin. Lectures on Jurisprudence by John Austin, who was a disciple of Bentham, were published in 1832 and have attained great celebrity. This book was the first systematic and scientific treatise on general jurisprudence in English, and has exerted a great influence on subsequent writers. With it and the works of Bentham may almost be said to have begun the more philosophical and less purely technical treatment of the common law that now prevails.

CHAPTER III.

THE ARRANGEMENT OF THE LAW.

Juridical subdivisions of the law.

48. The subdivisions of the law mentioned in the previous chapters depend not upon anything in the nature of law itself but upon extraneous causes, political arrangements or historical accidents. There would have been no distinction between law and equity, for instance, if Parliament in former times had been willing to make the necessary changes in the common law; and the whole of the unwritten law might be codified and thus transformed into written law. No scientific arrangement of the law therefore can be based upon those divisions. But there are certain distinctions which now fall to be described, which are juridical and necessary in their character, and are therefore capable of serving as the basis of an arrangement.

Public and private law.

49. "When both of the parties with whom a right is concerned are private persons, the right also is private; when one of the persons is the state while the other is a private person, the right is public."[1] This gives rise to a division of law into public and private. Public law comprises: (1) laws relating to the boundaries and geographical divisions of the state, (2) constitutional law in the ordinary sense,[2] (3) administrative law, or the law of the details of government and administration, embracing such subjects as taxation, police, public health and education, poor laws, highways, weights and measures, currency and many others, (4) military and naval law, (5) a part at least of the ecclesiastical law, if there is a state church, (6) criminal law, and (7) international law. Private law is that part of the law that deals with private rights and duties; but when the state holds property or makes contracts in the same manner as a private person might do, these fall under the rules of the private law.

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[1] Holland, Jurisprudence 109.

[2] See § 43. The American constitutions contain some private law.

Normal and abnormal persons.

50. Persons are normal or abnormal. An abnormal person is one who belongs to a class having some important peculiarity, by reason of which the law treats him in various ways differently from persons in general. Such persons are said to have an abnormal status. Much labor has been spent in the attempt to frame a general definition of such a status, but in vain. It is a mere matter of convenience. There are some persons whose juristic peculiarities are so numerous and important that it is more convenient to class them apart; and that is all that there is to say. Married women and lunatics are undoubtedly abnormal persons; bankers and innkeepers are not, although they have certain rights and duties different from those of other people.

Status.

Jus rerum and *Jus personarum.*

The law, or at least the private law, may be divided into two parts, one containing those rules which apply to persons generally and the other the peculiar rules relating to abnormal persons. The former is called the law of normal persons, the law of equal rights or sometimes the law of things, *jus rerum;* the latter the law of abnormal persons, the law of unequal rights, or sometimes the law of persons, *jus personarum.* The names *jus rerum* and *jus personarum* were borrowed from the civil law. The Institutes of Justinian were divided into three parts, Persons (*De personis*), Things (*De rebus*), and Actions (*De actionibus*). By means of a peculiar theory of incorporeal things[3] the title Things was extended to cover not only the law of property in the strict sense but also contracts and wrongs; and rights other than property rights and the duties corresponding to rights were not given any separate place in the arrangement but were treated of only incidentally under the head of wrongs.[4] Under the title Persons the principal matters discussed were rights and capacities connected with freedom and family relations. Later writers used the titles *Jus personarum* and *Jus rerum,* the latter including actions. Thus it happened that in the civil law the greater part of the law of normal persons in fact fell into the *jus rerum,* and the *jus personarum* included

Arrangement of the Institutes.

[3] See § 217.

[4] Or rather of the obligations which arose out of the commission of wrongs. See § 254.

nearly the whole of the law of abnormal persons, so that those names very naturally came to be used to denote those parts of the law respectively. As applied in the common law the names are inappropriate; but they have the authority of usage and the convenience of brevity on their side.

Antecedent and remedial rights.

51. Rights and duties are either antecedent or remedial, or, as they are otherwise called, primary or secondary. Remedial rights arise out of the commission of wrongs or sometimes from threateued wrongs; antecedent ones do not. Such rights as personal security, property or contract rights are antecedent; but the right to sue and recover damages for a wrong or the right to an injunction to prevent a threatened injury is a remedial right. Corresponding to this division among rights and duties, the law is divided into the law of antecedent and of remedial rights and duties.

Substantive and adjective law.

52. Another division of the law is into substantive and adjective law. The former deals with rights and duties, the latter with the procedure by which these are enforced. This must not be confounded with the remedial law. If an injury has been or is about to be committed, the substantive law of remedial rights determines whether an action will lie, whether pecuniary damages, an injunction or some other form of relief is the appropriate remedy, and the amount of damages that can be awarded. But the questions, in what court and within what time the action must be brought, how the plaintiff's case must be presented to the court and by what kind of evidence it must be proved, belong to the adjective law.

The arrangement of the common law.

53. There is no authoritative or generally accepted arrangement of the common law. Various schemes of arrangement have been proposed from time to time, but none of them has met with much favor. The one which is the best known and most generally used is that of Blackstone's Commentaries. It is as follows.[5]

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[5] There is an introduction on the nature of law, the law of England, common law, mercantile law, etc., and written and unwritten law, and a chapter on equity at the end, which fall outside of the plan of the arrangement.

Blackstone's arrangement.

RIGHTS.[6] (*Books I and II.*)

OF PERSONS.[7] (*Book I.*)

Natural persons.

Absolute rights. (Security, liberty and property.)[8]

Relative rights.

Public relations.

Magistrates.

People. (Nationality; the clergy, nobles, etc.)

Private relations. (Marriage, children, guardianship, servants.)

Artificial persons; corporations.

OF THINGS. (*Book II.*)

Real property. (Principally property in land.)

Personal property; including contracts.[9]

WRONGS.[10] (*Books III and IV.*)

PRIVATE wrongs. (*Book III.*)

Remedies without suit.

Remedies by suit.

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[6] The disposing of the whole law under the two heads of Rights and Wrongs leaves no proper place for duties. So far as Blackstone discusses duties at all he does so only incidentally in connection with the rights to which they correspond or the wrongs that may arise from their breach.

[7] The distinction between "Rights of Persons" and "Rights of Things" was taken by Blackstone from the civil law division into *jus personarum* and *jus rerum* (See § 50). But those expressions were misunderstood by him. *Jus* in them means law, not right. All rights are rights of persons, even property rights, so that Blackstone found himself compelled to mention property under the absolute rights of persons in his first book, although he afterwards devoted the whole of the second book exclusively to that subject.

[8] Absolute rights here mean the private rights of normal persons, such as everyone is presumed capable of having. This part contains an incomplete enumeration of rights *in rem* (See § 254), though they are not called by that name. By relative rights are meant the rights of abnormal persons and public rights, the public law being treated by Blackstone (in which respect Austin agrees with him) as a branch of the law of abnormal persons.

[9] There is no separate head of obligations or rights *in personam*. Contract rights are treated as a kind of property, and contracts merely as a mode of acquiring property; other kinds of obligations are not noticed.

[10] Private wrongs are civil injuries (See § 278), and public wrongs crimes. The arrangement of the former is based partly upon the nature of the remedies which the law provides for different wrongs and partly on the rights violated, *i.e.* partly upon remedial and partly upon antecedent rights.

Courts of civil jurisdiction.
Wrongs and remedies for wrongs.
Procedure.

PUBLIC wrongs. (*Book IV.*)
Criminal courts.
Crimes.
Criminal procedure.

The present writer's arrangement.

54. Blackstone's arrangement, for reasons which are partly stated in the notes to the preceding section, seems to the present writer unscientific and inadequate. The following is the author's own arrangement, the grounds of which will appear from the analysis and discussion of legal ideas and principles contained in this book.

PRIVATE LAW.[11]
SUBSTANTIVE LAW.
Of normal persons.
Definitions and general principles.
Rights and duties.
Rights *in rem*.[12]
Duties corresponding to rights *in rem*.
Rights *in personam* and their corresponding duties.
Obligations.
Trusts.
Special rights and duties, partly *in rem* and partly *in personam*, of special classes of normal persons.
Wrongs.
Remedies.

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[11] This is substantially the arrangement of Prof. Holland in his work on Jurisprudence, who tabulates private rights thus:—

Private { Substantive { Normal { Antecedent { *In rem.* / *In personam.* / Remedial } / Abnormal } / Adjective }

[12] For the difference between rights *in rem* and *in personam* see §§ 253,254.

Of abnormal persons.

Natural persons having an abnormal status.

Artificial persons.

ADJECTIVE LAW.

PUBLIC LAW.

Boundaries and geographical divisions of the state.
Constitutional law.
Courts.
Administrative law.
Military and naval law.
Ecclesiastical law, if there is a state church.
Criminal law.
The conflict of laws.

The arrangement of this work.

55. The above arrangement will be followed in the main in this work. But in some respects, since this book is intended for beginners in the study of the law, it seems best to depart from it, subordinating theoretical symmetry to the needs of the student. Thus although public law would in a systematic treatise naturally be placed after private law, because it refers to and uses many definitions and principles which are more properly discussed under the private law, yet in an elementary exposition for beginners it is rather the discussion of the private law that will presuppose some knowledge of the organization of the state and the functions of public offices, for which reason, and also because some historical matter which must be introduced comes in more naturally in that connection, the public law will be first taken up, excepting the criminal law which will be reserved to the last. The treatment of the public law must necessarily be very brief, being confined mostly to those matters which are necessary to a proper understanding of the other portions of the work, and omitting the greater part of the administrative law, which runs into infinite detail and is very different in different places, and of the ecclesiastical law, as well as the whole of the military law and the subject of the conflict of laws. Some further deviations from the general plan of arrangement will also be admitted for reasons of convenience.

PART FIRST. PUBLIC LAW.

CHAPTER IV.

ENGLISH CONSTITUTIONAL LAW.

The English constitution.

56. What is called the English constitution is not a written document like the constitution of the United States, but a collection of laws, written and unwritten, and of usages which have not technically the force of law and might be departed from at any time, in accordance with which the government is carried on. It is the product of centuries of development and struggle, and exhibits no symmetry or logical arrangement of its parts. It has always been characterized, like the English law generally, by great flexibility and adaptability to new conditions combined with conservatism as to form. Time honored forms are retained after their original use and meaning have departed, and are either put to new uses or suffered to stand without any signification. In describing the constitution, therefore, a certain difficulty arises from the divergence between theory and actual practice. Nor has the constitution any higher force or validity than any other part of the law. It might legally be changed to any extent by a simple act of Parliament. Parliament could even abolish the monarchy, if it chose.

The King.

57. After the Norman conquest the King was nearly an absolute monarch. Although practically his power was hedged in by many restraints and varied a good deal according to the personal force of the King, it is difficult to say what were its exact legal limits or how far the royal prerogative could override the law. The definite apportionment and limitation of powers to different officers and departments of government which characterizes modern civilized states was not to be found.

The King was the supreme law-maker, though he did not exercise his legislative powers very freely, the chief executive,

the supreme judge whenever he chose to act as such, the commander of the army, and in addition, as will be explained more fully when the feudal system comes to be treated of, the sole landowner and supreme landlord, all private individuals holding their land as tenants directly or indirectly of the King and owing to him certain duties arising from that relation. The government was the King's government, the public property was the King's property, the public revenue the King's revenue, and the expenses of government not clearly distinguished from the King's personal expenditure.

The King's councils.

58. But in the exercise of his powers the King was assisted by certain councils, whose advice, whether he was bound to do so or not, he often followed, and which, or the members of which, the high officers of state, necessarily transacted in his name a good deal of public business of which he had no personal knowledge. The history of the English constitution is the history of the gradual transfer of the power of the King to his councils and of the right to appoint the members of the councils from the King to the people, till the King has come to be mainly the dignified nominal head of the state, with considerable consultative and advisory powers and capable of exercising a good deal of influence but with almost no actual legal authority. The present government of England is a republic thinly disguised as a monarchy.

The present condition of the King.

Retention of ancient forms.

However, the ancient forms and modes of expression are still kept up. The government is administered in the King's name, by men who are in theory merely the advisers and counsellors of the King. The acts which they do are called his acts, although in fact he may have no power to control them nor any knowledge of them. To this day the heading of every statute recites that is enacted not by the Parliament, as is the actual fact, but by the King with the advice and consent of Parliament. The word "King" therefore, when it is used of the King in his official capacity, must be understood to be in most cases merely another name for the state or the government.

The title to the crown.

59. In former times the principle of hereditary descent and the principle of election were both to some extent and in a somewhat confused manner recognized as the foundation of the right to the crown. On the death of a King his heir was regarded as having at least a presumptive right to succeed to him, or perhaps as having a special claim to be elected in his place, and generally he did in fact succeed. In most cases some sort of a form of election was gone through with, and in a few instances there was an actual election by the great men of the realm. In later times the authority of Parliament in the matter was recognized, and at present the succession to the crown is governed by the provisions of the act of settlement passed by Parliament in the reign of William and Mary, by which it is limited to the descendents of Sophia, electress of Hanover and grand daughter of James I, being protestants, and on the death of a monarch passes to his heir.

The act of settlement.

Effect of the King's death.

Formerly on the death of a King an interregnum or lapse of the royal authority occurred until his successor was instituted in his place, the powers of officers appointed by the former King ceased, and much inconvenience ensued. This is now avoided by regarding the King as a corporation of a peculiar kind, which has a legal existence distinct from that of the person who for the time being fills the office, and which is not affected by his death. This is expressed in the maxim that "The King never dies." On the death of a King the government goes on without any break and his successor succeeds at once to the crown, no ceremony of investiture or coronation being necessary, though in fact a formal coronation is had at some convenient time afterwards.

The King can do no wrong.

60. It is a principle of law that the King can do no wrong. This applies to him both as an individual and in his official capacity.

Inviolability of the King's person.

1. His person is inviolate; he can not be punished for anything done by him even though the act if committed by a subject would be a crime. Nor can any suit or legal proceeding be maintained against him in any court, since such a proceeding implies a wrong for which redress is sought.

Responsibility of ministers.

2. In his official capacity he can not do any act except

through his ministers or council, every public document signed by him must be countersigned by a minister, and whatever responsibility is incurred by the act falls upon the minister or council and not upon the King. The legal theory is that the King acts upon the advice of his servants, and if he does anything improper it is because he has been misled by their bad advice, and they and not he must bear the blame. In fact the act is only formally that of the King and really that of some public officer who acts in the King's name, so that the rule that casts the responsibility upon the latter is perfectly just.

Unlawful grants by the King.

3. So if the King in his official capacity makes any unlawful grant of property or rights, the law presumes that he could not have done so unless he had been in some way deceived. Therefore a legal proceeding will lie to annul the grant on this assumption of fraud in obtaining it, which however is a mere legal fiction not carrying any implication of actual wrongdoing on the part of the grantee.

Wrongs done by the government.

4. Since the King can do no wrong, the law also presumes that if any wrong is done in his name by any of his officers he will rectify it as soon as knows of it. Therefore, although the King can not be sued in any court, the courts themselves being the King's courts and the judges his representatives, yet if a private person is in fact wronged by the government he is permitted to institute a legal proceeding which is practically a suit against the government but which, to save appearances, is put into the more respectful form of a petition to the King.[2] A trial is had as in an ordinary suit, and then, the King being supposed to be correctly informed about the matter, an order is made for the redress of the grievance.

The King's property.

61. At present the private property and income of the King are separated from those of the state, and he receives a regular salary like any other public officer; but the public property and revenues are still by a legal fiction spoken of as his.

The Queen.

62. A Queen is either a Queen regnant, like the late Queen Victoria, who is the same as a King, a Queen consort or a Queen dowager.

Queen consort.

A Queen consort is the wife of a reigning King. She is a

[1] See § 938.

subject, but has certain special rights and privileges. At common law married women were subject to various disabilities in the matter of holding property and making contracts.[2] From these the Queen is free, and stands in such matters on the footing of an unmarried woman. She can even receive a grant of property from her husband, which is still impossible for married women generally. The Queen's person is also inviolable like the King's.

The husband of a Queen regnant is her subject. His legal status in each case that has thus far arisen has been fixed by special statutes, so that there is no general rule on the subject. The Queen's husband.

A Queen-dowager is the widow of a King, and has nearly the same rights as a Queen consort. If she marries a subject, she retains her rank instead of taking that of her husband. Queen dowager.

The heir apparent to the crown is by birth Duke of Cornwall, and is usually created Prince of Wales. The Prince of Wales.

63. Passing by the ancient witena-gemote, or assembly of wise men who acted as advisers to the King before the Norman conquest, there was after the conquest a council known as the Great Council (*Magnum Concilium*) or Common Council (*Commune Concilium*), by whose advice the King governed. This was composed in theory of all the King's tenants in chief, that is, of the King's immediate retainers or direct tenants, who were also called his barons;[3] so that it had a feudal rather than a national character. The greater barons, the richer and more important of the King's tenants, were summoned to the meetings of the Council by special letters or writs from the King to each of them individually, the lesser barons by a general writ of summons directed to the sheriff of the county[4] commanding him to notify them to appear, which was proclaimed at a session of the County Court.[5] Generally they did not attend, and their attendance was not desired; it was only with the great men of the kingdom that the King cared to consult. In course of time therefore the name baron came to The Great Council. The barons.

[2] See Chapt. LXII.

[3] The ward baron meant originally man, and secondarily a feudal retainer or vassal: see § 446.

[4] See §§ 93,94.

[5] See §§ 174,175.

be applied exclusively to persons who were entitled to a personal summons to the Council, and became a title of nobility. The higher clergy, the bishops, archbishops and abbots, were also summoned individually to the Council, and were regarded as a kind of nobles, the lords spiritual. The Great Council met at irregular intervals when summoned by the King. It advised the King in matters of legislation and administration, and sometimes acted as a court for the trial of important cases, especially when the King was a party or when the litigants were powerful men over whom it was difficult for the ordinary courts to exercise an effective jurisdiction.

The lords spiritual.

Taxation.

64. The ordinary revenues of the Crown, which consisted mainly of the income from the King's own property, the dues which as a feudal lord he was entitled to exact from his tenants and the profits of the administration of justice in his courts, often proved insufficient for his needs. In such cases he had to ask the Council for a grant of additional money, as even in those days an attempt on the King's part to impose taxes by his own authority without the consent of the tax-payers, whether strictly lawful or not, would usually have met with resistance. Thus the principle gradually became established and acquired the force of positive law that taxes should not be levied by the King's sole authority but be granted by the people who were to pay them or their representatives. Since the Council was composed usually of the greater barons only, who had no representative authority but answered for themselves alone, it became desirable for purposes of taxation to have the other classes of the community represented. Accordingly, since the mass of the smaller tenants in chief could not attend the Council, the sheriffs were commanded on occasions when it was thought necessary to cause to be elected at the County Courts two knights for each county or shire to consent to taxation on behalf of the inhabitants of the county. These were called knights of the shire. Since at the County Court all the freemen of the county attended and voted, the knights represented the people generally and not merely the King's tenants in chief. In course of time representative burgesses from chartered towns or boroughs were summoned

Representation of the commons.

Knights of the shire.

Burgesses.

for the same purpose. The bishops also were ordered by the royal writs by which they were summoned to cause the clergy of their dioceses to send representatives; but this the clergy always refused to do, preferring to grant their own taxes in their own assemblies. The clergy.

Thus the Great Council of the King's feudal vassals gradually developed into what is now known as the Parliament. The nobles, the lords temporal and spiritual, sat by themselves in their own House of Lords, and the representatives of the counties and towns, of the commons or common people, in the House of Commons. The lords, commons and clergy constituted the three estates of the realm, each of which at first consented separately to its own taxes, or as the expression then was granted its own separate aids, benevolences or subsidies to the King. Parliament. The estates of the realm.

65. At first the object of summoning the commons to Parliament was simply to tax them, and for some time they were averse to taking an active part in legislation. But this did not long continue. The commons began to exercise the law-making power conjointly with the lords, and enforced their right to legislate by refusing the subsidies for which the King asked till he consented to their legislative measures; whence it became an established constitutional principle that the redress of grievances should proceed the grant of supplies. Legislation by Parliament.

Since in theory the King was the law-maker and the Parliament did not legislate but only advised the King to do so, the proposals of the Parliament were presented to the King in the form of petitions or bills, to which if he assented, the details were settled and the formal statutes drawn up by the King after the adjournment of Parliament. But as the King in his statute did not always faithfully carry out the intention of the bill, the Parliament about the time of Henry VI began to draw up their own statutes and require the King to assent to them *in haec verba*. Eventually, although the King in Parliament is still nominally the legislator, the law-making power passed entirely into the hands of the Parliament, and the assent of the King to a statute, though in theory of law still required, has not been refused for more than a hundred years, and what Bills and statutes.

would happen if the King should veto a bill no one at present seems to be able to say.

The House of Lords.

66. The House of Lords now consists of the archbishops and bishops, all the peers[6] of the United Kingdom[7] and of England, who sit by hereditary right, and a certain number of representative peers of Scotland and Ireland elected by the nobles of those countries from their own number, to which have been added during the reign of the late Queen a few life peers nominated by the Crown. Its presiding officer is the Lord Chancellor[8] who occupies a seat known as the woolsack.

The House of Commons.

67. The House of Commons contains between six and seven hundred members. Besides seven members for the universities, these comprise members for the counties, the successors of the knights of the shire, and members for cities and towns. The counties, and also the cities and towns when they are large enough, are divided by the redistribution act of 1885 into election districts or constituencies each of which returns one member, except the city of London which as a single constituency sends two. The method of election was formerly by *viva voce* voting, but since the ballot act of 1872 has been by written ballot. The duration of a Parliament, after having been subject to much variation, was fixed by the septennial act passed in the reign of George I at seven years; but the Crown may at any time dissolve it and order a new election. The Crown also has the power to prorogue Parliament, that is, to adjourn a particular session, either to a fixed day or *sine die*. The presiding officer of the House of Commons is called the Speaker and is elected by the house at the beginning of each Parliament.

The elective franchise.

68. The elective franchise or right to vote for members of

[6] The word peer (*pares*) means equal. It was first applied to all the vassals, or all the free vassals, of any feudal lord, and therefore to the King's vassals, and then was restricted in the sense in which it is here used, like the word baron, to such of the King's vassals as were nobles. It now means simply a nobleman. Some traces of its older use survive. The famous expression "trial by one's peers" means for a nobleman trial before the House of Lords, for a commoner trial by jury.

[7] The United Kingdom means Great Britain and Ireland. Great Britain is the name given to England and Scotland collectively since their union.

[8] See § 72.

Parliament does not belong to all persons. It is confined to males of full age, but in some elections for local officers women are permitted to vote. Nor does universal suffrage prevail even among men. The qualifications for voting have varied a good deal at different times, and though from the reform bill of 1832 to the present time the franchise has been extended by various statutes, the theory of the law still is that the poorest and most ignorant classes shall be excluded from the suffrage because of their presumed unfitness for its exercise. The right is at present regulated by the representation of the people act of 1884, which makes its possession depend in most cases upon (1) the holding of a certain small quantity of land, (2) the occupation of land at an annual rent of at least £10 and the payment of taxes on it, (3) the occupation and inhabitance for a year of a separate dwelling, which is known as the household qualification, or of lodgings at a rent of not less than £10 annually. The details of the act are somewhat complicated.

The enacting of statutes.

69. In order to become a law a bill must be passed by both houses. It may originate in either house, except that by a practice which, whether it has the force of law or not, is never departed from, bills for raising revenue must originate in the House of Commons.

Powers of the houses.

Each house of Parliament has power to preserve order, to protect itself against undue interference and to enforce its lawful orders by punishing the offender for contempt, substantially in the same manner as a court has, which will be explained in another place. It has also authority to judge of the right to sit of any one claiming to be a member. Thus if a question arises whether a person presenting himself as a member of the House of Commons is legally qualified to be a member or has been duly elected, the House may decide it. But as it was found by experience that such questions, which are really judicial in their nature, were apt to be decided by party majorities on political grounds, the House of late years has wisely delegated the investigation of such questions to the courts and accepts the person whom the court after a regular trial declares to be entitled to the seat.

Privileges of members.

The members of both houses enjoy an unlimited right of free

speech in their respective houses,[9] and also the right of exemption from arrest for any cause except treason, felony or breach of the peace on their way to Parliament, during their attendance there and on their return, *eundo, manendo et redeundo.*

The council of the peers.

70. But although the Great Council thus became transformed into the Parliament, yet the barons apart from the representatives of the commons continued to constitute a separate council of the Crown. Even after Parliament had become the ordinary advisers of the King in matters of legislation he still occasionally made laws with the advice and consent of the great men only. This council has now lost all its legislative powers, but some remnants of its ancient functions remain. Thus it is still said that every peer of the realm is an hereditary counsellor of the King and has a right of audience with the sovereign on public matters, which right however has practically fallen into disuse. The judicial powers of the Great Council also never passed to the Parliament, but remained vested in the council of nobles, and are now exercised by the House of Lords to the exclusion of the Commons.[10] When the House of Lords sits as a court not all its members take part in the proceedings. Its judicial functions are in fact exercised by a small committee known as the law lords, who are lawyers. Certain eminent lawyers are appointed by the Crown as life peers for this purpose.

Judicial functions of the House of Lords.

The King's Court.

71. So large a body as the Great Council or the council of the peers was unsuited for the ordinary business of administration. The usual council of the King was a smaller body known as the King's Court[11] (*Curia Regis*), the King's Council or in later times simply as the Council. This had no fixed membership. It consisted of the great officers of state and of the King's household, those two classes of officials not being at that time very clearly distinguished from one another, and such other persons, mostly barons or prelates, as the King chose to call upon from time

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[9] See § 731.

[10] See § 187.

[11] The word court formerly denoted not only what is now called a court but also any legislative or administrative body. Some remnants of this older usage still exist. Thus in several of the United States the legislature is called the General Court.

to time for advice and assistance. Among the great officers were the Justiciar and the Chancellor.

72. The Justiciar or Chief Justiciar was the highest officer of the kingdom. He acted as the King's deputy and representative when it was not convenient for the King to act in person, presiding in the Council in the King's absence. The office however became extinct before the end of the reign of Henry III, leaving the Chancellor as the next in rank to the King. The Justicia

The Chancellor (*Cancellarius*) was originally the chief of the King's chaplains and chief secretary to the King, it being almost a necessity in those illiterate days that a secretary should be a clerk or ecclesiastic. As being the King's spiritual adviser he was called the keeper of the King's conscience, and in his capacity of secretary he kept the great seal and affixed it to the royal writs, charters, commissions, and other documents, so that he became the ordinary channel through which the King's will was formally expressed. The office of Keeper of the Seal has however on a few occasions been separated from that of Chancellor. Besides the great seal there is a privy seal, not kept by the Chancellor but by a special Keeper of the Privy Seal, used for authenticating certain royal mandates; this in turn must be distinguished from the King's signet or private seal. Standing in such an intimate and confidential relation to the King, it was inevitable that the Chancellor should become a great officer of state, and accordingly at least as early as the reign of Henry II he is found as a principal member of the King's Court inferior in rank only to the Justiciar. For some centuries the office was filled by priests, but in modern times the Chancellor is always a lawyer. He exercises at present many important functions on the King's behalf, especially in the supervision of charities and of funds given for charitable purposes, in disposing of the smaller church livings belonging to the King, and representing the King in his capacity of *parens patriæ* as the general guardian of all infants, lunatics and idiots. The Chancellor

73. The King in or with the assistance of his Council, or the Council in his name when he did not act in person, The conduct of the government

carried on the government. There was not at first any regular division of the functions of government among different organized departments. The King employed such agents and advisers as from time to time he thought best. Even his different councils were not always clearly distinguished from each other either in membership or functions. In many old records when the King's Council is spoken of it is difficult or impossible to say with certainty which council is meant. It was only gradually that the King came to legislate exclusively with the advice of his Parliament and to administer and judge with the advice of the others. But the *Curia Regis*, being a more compact body and always in attendance on the King, naturally appropriated to itself the executive and judicial business. At an early period however two great offices or departments became differentiated from the Council. These were the Exchequer and the Chancery.

The Exchequer.

74. The Exchequer (*Scaccarium*) was originally the *Curia Regis* or some of its members sitting for the transaction of business connected with the collection of the royal revenue. It is said to have taken its name from the chequered cloth on the table around which its members, who in that capacity were called the barons of the Exchequer, sat. It was divided into two parts, the Exchequer of Account where the accounts of the King's debtors were settled, and the Exchequer of Receipt where the amounts found due were paid in, each of which had its separate clerical staff. The Justiciar, the Chancellor and the King's Treasurer were members of the Exchequer. But after the office of Justiciar became extinct and the Chancery became a separate department, a special Chancellor of the Exchequer was appointed to be the head of the Exchequer. In course of time the Exchequer became entirely separate from the Council.

The Chancellor of the Exchequer.

The Chancery.

75. The Chancery (*Cancellaria*), or Court of Chancery, was the office of the Chancellor, which was provided with a corps of clerks by whom all the merely routine business of the Chancellor, such as drawing up, sealing and issuing writs, was done, the Chancellor himself being engaged for the most part in more important tasks as a member of the King's Council and his confidential adviser. It was first definitely

separated from the Exchequer toward the end of the twelfth century. The administrative functions of the Chancery are now exercised by what is known as the crown office in Chancery.

The Privy Council.

76. The judicial powers of the Council in course of time mostly passed over from it to various courts, as will be hereafter explained. But in executive and administrative matters it is still in theory, under its modern name of the Privy Council, the ordinary advisory council of the Crown; or rather, it is the body through which the Crown must in form do most of its official acts. The constitutional executive is not the King simply, but the King in Council. However in certain classes of matters the royal will is expressed through the Chancery or through certain other departments of the government which will be described a little farther on. The acts of the Crown done by the advice of the Privy Council take the form of orders in council or proclamations.

The constitutional executive.

Orders in council and proclamations.

The Privy Council consists of such persons as the King chooses to appoint, who hold their positions during his pleasure. The number of its members is not fixed and is usually very large, the office of Privy Councillor being often conferred as an honorary distinction. Only a few of its members take part in its business.

The Cabinet.

77. But such a body is plainly unfit to serve as an actual governing body, and the real executive government of the kingdom is a smaller council known as the Cabinet, the Administration, the Ministry or the Government. The head of the Government is called the Premier or Prime Minister; he is in fact the chief executive, the King, it may almost be said, in everything but name. Both the Cabinet and the office of Prime Minister have a *de facto* existence only, being entirely unknown to the law and without any legal status or authority. The King selects some person to form a Cabinet, and appoints him to the headship of one of the great departments of state. Usually he is made First Lord of the Treasury, but sometimes prefers some other office, such as that of Secretary of State for Foreign Affairs or Chancellor of the Exchequer. He in turn, subject to the approval of the King, chooses the other ministers, who are thereupon appointed to

The Prime Minister.

Selection of the Cabinet.

various high offices. By usage the members of the Cabinet must be appointed Privy Councillors, if they are not so already. The Cabinet, having no legal authority, can not issue any order or do directly any act of government. Theoretically it only tenders advice to the King, which he is legally free to follow or not as he pleases. He has a right to attend the meetings of the Cabinet, and usually does so. His opinions and wishes have much weight, but the Cabinet may disregard them if it chooses. In fact the Cabinet decides what shall be done, and its resolutions are carried into effect by acts of the Privy Council or of the proper departments of the state as being the will of the King. The Privy Council, instead of being an actual advisory body, has become for the most part a mere instrument for formally registering and executing the decisions of the Cabinet. There is no legal way to compel the Privy Council or the departments to carry out the resolutions of the Cabinet; but the members of the Cabinet are themselves the acting Privy Councillors and the heads of the departments.

Functions of the Cabinet.

Party Cabinets.

Theoretically the members of the Cabinet are selected by the Crown. But practically by a custom, which, though it has not the force of law, is never departed from, the Crown selects as Premier the leader in one of the houses of Parliament of the political party which at the time has a majority in the House of Commons. If the selection is not acceptable to the House of Commons the Cabinet will soon be overthrown in the manner presently to be explained, and on one recent occasion at least the person to be appointed Premier was chosen at a conference of the majority party in the House. And the person nominated will refuse to serve unless he is permitted to select his associates in the government, who are nearly always of his own political party and the majority of them members of one house or the other of Parliament. The right of the Crown to choose its ministers is little more than a form. In substance they are elected by the House of Commons, and indirectly therefore by the people.

Dependence of the executive upon Parliament

78. Since the House of Commons controls the government by its control over legislation and taxation, it is practically impossible for an Administration to go on without the support of the House. Therefore it is understood, though there is no

law to that effect, that if the opposite party obtains a majority in the Commons or the House refuses to pass any bill which the Ministry regard as necessary for the carrying out of their governmental policy, or if the House passes a vote of want of confidence in the Ministry, the Cabinet shall resign in a body and a new Cabinet be appointed which shall be in accord with the House. The only alternative is for the Government to "appeal to the country," that is, to advise the Crown to dissolve Parliament and order a new election, in the hope of getting in the new House of Commons a favorable majority. If such a majority is not obtained, the Cabinet resigns.

Appeal to the country.

On the other hand the Prime Minister and most of the other Cabinet ministers, being members of Parliament, continue to take an active part in its proceedings; and, although every member of Parliament has a right to introduce bills to be passed into statutes, practically most important bills, including all bills for granting supplies, are brought in by the Government, that is, by some member of the Cabinet in accordance with a resolution of the Cabinet, the bill having been discussed and its form settled in the Cabinet before its introduction. These are called government bills. Thus the Cabinet, itself a creature of the House of Commons and not unfrequently spoken of as amounting to a mere committee of that House, guides and to a great extent controls legislation. In its practical operation therefore the British constitution is government by a party majority in the House of Commons, under the guidance and through the instrumentality of a Cabinet composed of the party leaders, which majority is in its turn dependent upon the voters for its existence, the King, by whom everything is ostensibly done, having no actual direct authority, but having a right to be kept informed of everything that goes on and often capable in fact of accomplishing a good deal by advice and personal influence.

Leadership of the Cabinet in legislation.

Government by party.

79. The House of Lords, which is not elected by the people, cannot be dissolved, is not responsible to any body, and has legally equal legislative powers with the Commons, stands as it were outside of this governmental scheme, and might seriously interfere with its workings. But it has become an established constitutional usage that the Lords shall not withstand

Constitutional position of the House of Lords.

the clearly expressed will of the country. Their action is chiefly confined to revision and minor emendations in bills. If they reject entirely an important measure sent up from the Commons, and the lower house after a second consideration again passes the bill, the Lords will generally assume that such deliberate action of the elected chamber expresses the will of the country and will yield. If not, and the matter is of sufficient importance, the Government may dissolve Parliament and appeal to the country, and the express decision of the voters on a point will seldom be resisted by the Lords. If the Lords are stubborn, the Government has the power to swamp the House and obtain a majority in its favor by advising the Crown to create new peers, an extreme measure only to be resorted to in great emergencies, and the mere threat of which has generally been sufficient to bring the Lords to submission, as at the passage of the first reform bill in 1832.

Recent development of the constitution.

80. This system of cabinet government, outside of the law and resting upon mere understandings and usages, has only been perfected during the present century. It is a noble monument to the fairmindedness, political sense and self restraint of the English public men, which alone make it workable.

Departments of state.

81. The administrative business of the government is distributed in modern times among various departments which have now to be spoken of. Generally the nominal head of each department is a member of Parliament and of the Cabinet, changing with every change in the Ministry, by which the department is kept in touch with the supreme executive and provided with a mouthpiece in the legislature, while the experience and knowledge of details necessary for its work are supplied by a permament staff of subordinate officials the principal of whom is the permanent under secretary. There is often also a parliamentary secretary, who goes out of office with his chief. The great offices are sometimes put into commission, several of them permanently so, which means that instead of being filled by a single person their powers are vested in a board or committee. The departments and the functions of the various high officers of state have never been arranged on any systematic plan, but have grown up so to speak at

Offices in commission.

random, and changes have been made from time to time as convenience dictated. The details are therefore very complicated, and only a brief outline can be given here.

The Royal Household.

82. The officers of the royal household, such as the Steward, the Chamberlain, the Marshal, the Constable, and sundry others may be passed over. Those offices early became hereditary and merely honorary, and their real work is at present nearly confined to certain ceremonial functions. The Lord Chamberlain however supervises theatres and licenses plays, and the Lord High Steward presides at certain trials in the House of Lords.[12]

The Secretaries of State.

83. When the Chancellor became a great officer, another secretary for the King became necessary. He too grew in importance, and became the Secretary of State. At present there are five Secretaries of State, known respectively as the Home Secretary and the Secretaries for Foreign Affairs, for War, for the Colonies and for India, each of whom is the head of a department of the government and a member of the Cabinet.

The Treasury

84. The Treasury has separated from the Exchequer, taking the place of the old Exchequer of Account and leaving to the ancient office the duties merely of the Exchequer of Receipt. The office of Treasurer is in commission in the hands of a Treasury Board consisting of the First Lord of the Treasury, the Chancellor of the Exchequer and a varying number of junior lords.

The Admiralty.

85. The Admiralty is a very ancient office having charge of naval affairs. It was formerly under the Lord High Admiral, but now is managed by a commission consisting of a First Lord and four Naval Lords. The commission and two secretaries make up the Board of Admiralty.

Executive boards.

86. There are also certain boards of more modern creation. "These, unlike the Treasury Board and the Admiralty Board, do not represent great offices put into commission; in earlier times they would have been committees of the Privy Council; the oldest of them, the Board of Trade, has never, strictly speaking, ceased to be such a Committee. But the Boards are in most cases phantoms; and the President of each Board, though by its statutory constitution he would play a minor part among the

[12] See § 187.

great officers of State of whom the Board consists, is in fact the sole head of his department."[14]

Board of Trade.

The Board of Trade has a large and miscellaneous field of operations in matters connected directly or indirectly with commerce and intercourse. It has supervision and control in many respects over the construction and operation of railroads, gas and waterworks and electric lighting plants, harbors, lighthouses, and merchant ships and their crews.

Board of Works.

The Board of Works, as its name implies, has charge of public works executed by the government.

Local Government Board.

The Local Government Board is the organ through which the central government now usually acts when it interferes at all in matters of local government. It is of very recent creation, its functions having formerly pertained to the Privy Council, the Home Secretary and the Poor Law Commissioners or Poor Law Board, which last two are now abolished.

Agriculture. Education.

The Board of Agriculture and the Committee of Council on Education call for no more than mention.

Irish Office.

The Irish Office is a department of the Home Office, represented in the Cabinet either by the Lord Lieutenant of Ireland, the representative of the Crown and head of the executive government in that part of the United Kingdom, or by his chief secretary, who is usually the active head.

Scotch Office.

Scotch matters until 1885 came under the jurisdiction of the Home Department, which was assisted by the Lord Advocate of Scotland. In that year however a Scotch Secretary was appointed as the head of the Scotch Office. He is not a Secretary of State.

Appointment and tenure of office.

87. As a general rule executive and administrative officers, and also judges, are appointed by the Crown and hold their offices during the royal pleasure. In fact, however, except in a few political offices which are refilled at every change of the Cabinet, no officer is removed for his political opinions or except for some good reason, so that the tenure of office is practically for life. The power to appoint is sometimes exercised by the Crown directly, on the advice of the Cabinet, that is, practically by the Prime Minister in the name of the Crown, and sometimes by other high officers such as the Chancellor or First

[14] Anson, Law and Custom of the Const., Vol. II, Ch. IV.

Lord of the Treasury, each of whom has a large patronage at his disposal. Admission to the lower ranks of the civil service is now usually by competitive examination, which is open to all properly qualified candidates. The powers of the higher officers and departments of government are either those which they exercise as representatives of the King, which in theory he might exercise himself, or powers specially conferred upon them by act of Parliament.

Powers of officers.

88. The royal prerogative means such remnants of the extensive and undefined powers once held by the King in the capacity either of chief magistrate or of supreme feudal lord as still remain to be exercised by him or by the executive government which represents him. The history of English liberty is the story of the struggles by which the Parliament and the people have won prerogative after prerogative from the Crown, now by force of arms, now by purchase, now by usage gradually hardening into prescriptive right. The exact extent of the royal prerogative is even yet not defined, the Crown having for a long time ceased to press doubtful claims. It is now well settled that the Crown can not make laws or impose taxes by proclamation or order in council without the consent of Parliament, or interfere with personal liberty, property or other private rights except by due process of law.

Prerogative.

89. Certain great constitutional statutes mark important stages of the struggle between the Crown and people. The chief of these are:

Constitutional statutes.

(1). The Great Charter (*magna carta*) of King John, forced from him by the armed barons, by which the King relinquished his claim to do various acts injurious to the liberties and rights of the people and especially of his own tenants, and promised to abstain from them in the future, and feudal lords were forbidden to oppress their own vassals. The Great Charter was many times re-issued and confirmed, particularly by the statute of Edward I known as *confirmatio cartarum*.

Magna Carta.

(2). The Petition of Right, an enumeration of some of the most essential principles of personal rights and free government, prepared by Parliament and assented to by Charles I in the third year of his reign.

The Petition of Right.

The *Habeas Corpus* act.

(3). The *Habeas Corpus* act, passed under Charles II, the great safeguard of personal liberty, which will be more fully discussed in another place.[14]

The Bill of Rights.

(4). The Bill of Rights, a declaration of rights resembling the Petition of Right, presented to and accepted by William and Mary on their accession to the throne and afterwards enacted by Parliament.

The Act of Settlement.

(5). The Act of Settlement already mentioned, by which the succession to the Crown is regulated and the control of Parliament over the matter maintained.

Constitutional usages.

To these may be added the constitutional usages above mentioned, by which the control of all departments of the government has passed to the representatives of the people in the House of Commons.

Principal royal prerogatives.

90. The principal prerogatives remaining, nominally to the Crown but exercisable through the Council or the departments of state, are:

(1). The general control and management of the executive part of the government.

(2). The conduct of foreign relations and the making of treaties, the declaring of war and concluding of peace.

(3). The command of the army and navy.[15]

(4). The right to confer honors and dignities; the King is the fountain of honor and office.

(5). The right to grant franchises and privileges, such as patent rights; though these may also be granted by act of Parliament.

(6). The right to coin money.

(7). The right as *parens patriae* to the guardianship of infants, idiots and lunatics.[16]

(8). Certain rights of legislation for the colonies and for British subjects in foreign countries.

(9). For convenience sake Parliament in legislating about

[14] See § 933.

[15] But the power to support an army and the authority to maintain discipline in it rest upon grants of money by Parliament and the statute known as the mutiny act, which, from the jealousy of Parliament against a standing army under the King's control, are only passed for one year at a time and are renewed each year.

[16] See § 1010.

a subject sometimes only embodies in statutory form the principal points of its legislation, authorizing the Crown or some department of the government to regulate the details by orders in council or regulations. A great deal of very important law is nowadays made in this way.

Revenue.

91. The public revenue, called the revenue of the Crown, is either ordinary or extraordinary. The former consists of certain ancient hereditary revenues formerly belonging to the King, which have been mentioned. The extraordinary revenues, so called, are the taxes voted by Parliament, and also the income derived from certain departments of the government. The most important of these are customs duties on imported goods, the land and house tax, direct taxes on other property and on incomes, excise duties, stamp duties, and the income from the post office and the telegraph service.

Collection of the revenue.

In ancient times the royal revenues were collected mainly by the sheriffs of the several counties, who acted as the King's bailiffs and accounted to the Exchequer at regular intervals. The taking of these accounts formed one of the chief among the *agenda* of the Exchequer. At present the collection of the revenue is chiefly through the post office, at the head of which is the Postmaster General, and through the offices of the Commissioners of Customs, of Internal Revenue and of Woods and Forests, which last have charge of the crown lands.

Consolidated fund.

92. It is not the practice to lay specific taxes for specific purposes or to appropriate the income from any particular source to any particular object. All the money collected goes into what is called the consolidated fund, and is paid into the bank of England to the credit of the Exchequer, from which it is transferred to the departments for their use on warrants countersigned by the Comptroller and Auditor General, an officer who is independent of every department, who audits the accounts of them all to see what they have done with the money thus appropriated to them. The warrants are drawn only in accordance with acts of Parliament appropriating the money. Some appropriations are permanent, authorizing money to be spent for certain purposes every year without continual application to Parliament, for instance the appropriations for the payment of interest on the na-

Comptroller and Auditor General.

Appropriations.

tional debt, and others are special appropriations for particular purposes or for limited times. The Chancellor of the Exchequer with the help of the various departments and on consultation with the Cabinet prepares each year an estimate of the expenses of the government and of the taxes necessary to meet these, which is called the budget, and submits it to Parliament.

The budget.

CHAPTER V.

LOCAL GOVERNMENT IN ENGLAND.

Counties.

93. The largest subdivision of the country for administrative purposes is into counties or shires, of which there are forty in England In ancient times the county was presided over by the alderman or earl (*comes*, count), under whom was the sheriff (shire reeve) or vicount (*vice-comes*). At a very early period the earl ceased to have any thing to do with the government of the county, and the sheriff remained as its chief officer, the title earl becoming a mere title of nobility. Afterwards vicount was also turned into a title of nobility, but the name *vice-comes* or *vicomes* continues in use as the Latin designation of the sheriff.

The sheriff.

94. Aside from his judicial functions, which will be spoken of in another place, the sheriff had formerly five kinds of powers and duties.

As a military commander.

(1). He led the military force of the county when it was called into service.

As keeper of the peace.

(2). He was charged with the keeping of the peace in his county, and was bound to suppress riots and disorders as well as to pursue and arrest criminals. He and his subordinates formed the ordinary police force of the county.

As returning officer.

(3). The royal writs for summoning the lesser barons to the Great Council were directed to him, as are still the writs for the election of members of Parliament; so that he has important duties in connection with the conduct of elections, the result of which he, as returning officer, certifies to the crown office in Chancery.

As executive officer of the courts.

(4). He is the executive officer of the courts in his county; writs and mandates from the courts are usually directed to him, and it is his duty to carry them into effect.

As the King's bailiff.

(5). As the King's bailiff he formerly collected the royal revenues in his county. From this function of his the county

is often called his bailiwick, a word originally used in Normandy to denote a territorial division analogous to a county.

At present only the third and fourth of the above mentioned duties remain to the sheriff.

The shrievalty.

The sheriff, who is known as the high sheriff, is appointed by the Crown, and his office, called the shrievalty, is one of great dignity, being usually filled by one of the most considerable gentlemen of the county. Its duties are in fact performed by under sheriffs, deputy sheriffs, and a lower class of officers known as bailiffs or sheriff's officers. These are appointed by the sheriff, and he is personally responsible for their conduct, for which reason he always requires them to give bonds to him with sufficient sureties for his indemnification. His bailiffs are therefore known as bound bailiffs, which the vulgar corrupt into bumbailiffs.

The sheriff's subordinates.

The *posse comitatus*.

95. If the sheriff meets with resistance in performing his duties, he may call to his aid the *posse comitatus* or power of the county, which consists of all men within the county capable of bearing arms, or such of them as the sheriff thinks fit to call upon. Any person who refuses to assist the sheriff at his command is guilty of a crime. If the power of the county is not sufficient, a military force will be placed under his orders. The sheriff is therefore the usual channel through which the public force, which lies behind the law and is implied in the idea of law, is brought to bear in case of need upon a recalcitrant individual.

The Lord Lieutenant.

96. The command of the militia of the county was taken from the sheriff in the reign of Edward VI, and given to the Lord Lieutenant, who is appointed annually by the Crown. This was changed in 1871, and the militia is now under the War Office. The Lord Lieutenant is generally also the *custos rotulorum* or keeper of the records of the county.

The county police.

97. The police of the county now consists of a regular force called the county constabulary, distinct from the sheriff's officers, and under the control of the Home Secretary. At their head is the chief constable of the county, and the members of the force are called constables.

The coroner.

98. The officer of coroner (*coronator*) is of great anti-

quity. Coroners were originally appointed to take charge of pleas of the crown, that is, criminal prosecutions instituted in the name of the King; and therefore the chief justice of the court of King's Bench[1] was the principal coroner in England and could act as such in any county. There are a number of coroners in each county. They were formerly elected by the freeholders of the county, but now by the County Councils. Their principal business at present is to hold inquests with a jury to inquire into the cause of the death of any person who dies suddenly or by a violent death or in prison. This inquiry must be *super visum corporis*, so that if the body is not found no coroner's inquest can be held. The coroner also holds similar inquests to inquire about wrecks,[2] whether the property is wreck or not and who has possession of it, and about treasure-trove,[3] who were the finders and where it is.

Coroners' inquests.

The coroner acts as the executive officer of the courts in cases where the sheriff is disqualified, as if the sheriff be a party to the suit or of kin to a party. In such cases writs and mandates are directed to a coroner instead of to the sheriff.

The coroner as executive officer of the courts.

99. One of the most important duties of the King is to preserve peace and order. Therefore the public peace is called in England the King's peace.[4] Various officers who perform police functions, including sheriffs, constables and coroners, are called conservators of the peace or peace officers. The King himself is the principal peace officer. The Chancellor and certain of the high officers of state are also conservators of the peace *virtute officio*. Any peace officer has the same right as the sheriff to call for the assistance of the *posse comitatus* in case of need.

The peace.

Peace officers.

100. In the reign of Edward III certain officers called at first keepers or conservators of the peace, but afterwards justices of the peace, were appointed to assist in keeping the peace in each county. They are now commissioned by the Crown on the recommendation of the Lord Lieutenant, who is himself the

Justices of the peace.

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[1] See §181. [2] See §579. [3] See §576.

[4] In former times in England lords of liberties and franchises, who had grants from the Crown of criminal jurisdiction (See §455), might have a peace of their own, separate from the King's peace, which it was their duty to keep.

principal justice of the peace in his county, hold office during the King's pleasure and serve without pay. The office is generally filled by the landed gentry of the county. They are peace officers. Of the persons named in the commission a certain smaller number are specified, of whom (*quorum*) one or more must take part in certain kinds of official acts. The persons so designated are distinguished from their colleagues by the title of justices of the quorum. Four times a year a number of the justices hold a court of Quarter Sessions, and at irregular times two or more of them hold Petty Sessions.

The *quorum*.

Quarter Sessions.

Petty Sessions.

The duties of justices of the peace.

The judicial functions of justices of the peace will be considered hereafter. But gradually by a multitude of statutes nearly all the local administrative business of the county was put upon their shoulders. They were also entrusted with the appointment of various local officers, and with the levy and control of the taxes, or rates, for local purposes. It is quite impossible to enumerate even in outline the multifarious duties of those officers. There was never any system of local government; one duty after another was imposed upon the justices as was found convenient. Their power are exercised sometimes in Quarter Sessions or Petty Sessions and sometimes by single justices.

The old County Court.

101. From time immemorial a popular assembly known as the County Court, Shire Court or, in ancient times, the Shire Moot had been held in each county, at first twice a year but from about the beginning of the 13th century monthly. This was anciently a court of great importance and dignity, being regularly attended by the earl, the bishop and all lords of land and freemen of the county, and also by the parish priest, reeve, or head man, and four "best men" of each township to represent the lower class of people, who either being not fully free had no right to attend or on account of their poverty and insignificance did not attend. The persons who were bound to attend the court or, as it was said, owed suit to it, and who constituted the court, were called its suitors.[5] At an early

[5] Suitor now means a person who attends a court as a litigant. It formerly meant one who attended as a member of the court.

period the earl and bishop ceased to attend. Besides acting as a court for the trial of cases, this assembly transacted much of the administrative business of the county. Here statutes, royal orders and proclamations and legal notifications of all sorts were published by reading them to the people, and elections for public officers who were chosen by the people, such as coroners, were held. The representatives of the county in Parliament continued to be chosen in the County Court until 1872. Except however for that purpose and for a few others, mostly formal, the old County Court became obsolete some centuries ago.

County Councils.

102. By the local government act of 1888 a County Council, chosen by popular election, was created in each county or in each of the administrative districts into which some of the larger counties are divided, to which councils have been assigned most of the functions of local government and taxation, whereby the powers and duties of justices of the peace have been greatly curtailed and a larger degree of uniformity and system introduced over the whole country.

Hundreds etc.

103. The counties are divided into hundreds, which in some places are called wapentakes; and in a few counties, but not generally, the hundreds are grouped into larger districts bearing various names, such as ridings, trithings, rapes or lathes. These divisions are very ancient, but are at present of little importance.

Townships.

104. The smallest subdivisions of the county are townships or vills, parishes and manors. Townships are public civil divisions, and anciently had each its township moot or meeting of its inhabitants under the presidency of its reeve for the making of by-laws and the transaction of other business of common concern, and its beadle for police purposes. In some places the name tithing is used instead of township, and there appears to have been formerly some confusion between the territorial townships or tithings and the frank pledges, decennaries, or associations of ten men to be sureties for each other's behavior, which were introduced probably after the Norman conquest[6] and to which the name of tithings was often

Tithings.

[6] 1 Stubbs, Const. Hist. of Eng., Ch. V.

applied; the tithingmsn, or head man of a tithing, sometimes appearing as an officer of a township and sometimes as the head of one of those associations.

Parishes and manors.

105. The parish is properly an ecclesiatical division, which will be described in another place, and the manor represents an ancient estate of a feudal lord who had obtained by grant from the Crown certain governmental powers over his own tenants.[7] The parish and the manor have to a greater or less extent absorbed the functions that would more naturally belong to the township as a civil division. In some places the township organization seems to have wholly disappeared, the usual township officers being regarded as parish officers, while in other places the three organizations exist side by side.

Constables.

106. The principal officer of the township is the constable. The name constable (*comes stabuli*) is applied to various officers. The Lord High Constable is one of the officers of the royal household, ordinary high constables are officers of hundreds, and petty constables of townships. Petty constables unite in themselves two offices, the ancient office of tithingman, or as he was otherwise called, headborough or borsholder, and a more modern one of petty constable created about the reign of Edward III. In some places however these two offices are distinct and tithingmen are still separately appointed. All these officers are appointed by the Court Leet[8] when there is such a court, and if not, by the justices of the peace. They are peace officers, whose duties are to keep the peace and serve as police within their hundreds and townships, and to some extent they act as executive officers of the local courts.

Special constables.

Special constables are appointed by magistrates to execute warrants, arrest criminals or assist in keeping the peace on special occasions or in cases of emergency. This office is compulsory, any one qualified to be a constable being compellable to serve as special constable if commanded by a magistrate. Watchmen are a kind of policemen whose duty it is to keep watch and ward at night. Originally they were deputies of the constables, but are now often employed directly by parish or town authorities.

[7] See §453. [8] See §454.

107. A poor person who is unable to support himself has a right to support from the community, which right was first given by a statute of Elizabeth. A person who receives such public charity is called a pauper. This burden is thrown upon the parishes, each parish being bound to support its own poor. Every person for this purpose is considered to have a settlement in some parish. If he becomes a public charge, or is likely to become so, while sojourning or actually residing in another parish, he may be sent back to his own parish; or if he receives support from the former parish, that parish is entitled to reimbursement from the parish where the pauper is settled. The laws regulating settlement, being designed in great part to thwart the various tricks and devices to which parish officers resorted in order to foist their paupers on to other parishes, are somewhat complicated, and in former times presented a serious obstacle to the migration of working people who were not paupers from one parish to another. But this evil has been remedied by recent legislation. Relief may be given to paupers at their own homes, which is called outdoor relief, or at the poorhouse or workhouse of the parish, which is indoor relief. For economy's sake several parishes often unite into a poor law union to maintain a common workhouse and a common system of relief. The workhouse is also used as a place of confinement and punishment for petty offenders. The officers having charge of the administration of the poor laws are known as overseers or guardians of the poor, and are parish officers. Since 1834 these have been placed in subordination first to the Poor Law Commissioners, then to the Poor Law Board and now to the Local Government Board, which board appoints inspectors to oversee the parish officers. The rates or taxes for the support of the poor are separate from other local taxes and are known as poor rates. They are made and levied by the parish authorities.

The poor laws.

Settlement.

Relief of paupers.

Poor law unions.

Overseers of the poor.

Poor rates.

108. A borough seems to have meant originally a walled town,[9] but now it means a town incorporated as a municipal corporation. The ancient boroughs obtained by charters

Boroughs.

[9] A town must be distinguished from a township. The latter is a mere territorial division.

from the King or grants from their feudal lords exemption to a greater or less extent from the county and feudal jurisdictions and a considerable degree of self-government, and were also permitted to send representatives to the House of Commons. Membership in the corporate body, the franchise or freedom of the borough, did not belong to all the inhabitants, but to a select class known as burgesses, and depended sometimes on the holding of certain lands in the borough called burgess tenements, sometimes on belonging to a guild of merchants or craftsmen to whom the government of the borough had been granted, and sometimes upon other qualifications. The boroughs were never organized upon any general plan, but each obtained such privileges as it was able. The chief officer usually bears the title of mayor.

Burgesses.

Municipal corporations.

By the municipal corporations act of 1882 some regularity has been introduced into the organization of towns. A town or municipal corporation may be created by royal charter. Its burgesses consist of the resident rate payers; and the corporate body comprises the mayor, aldermen and burgesses. Its government is vested in its mayor and a council made up of councilors elected by the burgesses and the aldermen who are elected by the councilors. The council choose the mayor, manage the property and business of the town, make by-laws and levy taxes, subject to some supervision by various departments of the central government. Towns and boroughs have their own police forces. A policeman is a peace officer having substantially the same powers as a constable, and is often called a constable. These corporations also frequently maintain gasworks and waterworks, public libraries, parks and other conveniences for their inhabitants. A few cities and large towns constitute separate counties. In these, as well as in some large boroughs, the mayor and council also exercise the powers of county councils.

Corporate counties.

Cities.

109. The word city seems to have generally no fixed legal meaning. In common use it denotes a large town having a cathedral. Lately, however, certain large towns have been expressly chartered under the name of cities. The city of London is an ancient corporation occupying only a small space in the center of what is commonly known as London.

London.

The latter, the Metropolitan District, is an aggregation of boroughs and parishes, each with its separate government. But within a few years the entire Metropolitan District has been provided with a common local government with a Municipal Council having nearly the same powers as a county council.

Administrative districts.

110. Besides the civil divisions above mentioned, which may be called the ordinary civil divisions, there are in particular places districts organized for special purposes, such as sanitary districts or drainage districts. These are managed by boards of officials, often known as Local Boards, which are generally made up of already existing officers, for instance the officers of some borough or parish contained in the district, who exercise these powers in addition to their regular ones. Also boards composed of local officers or persons appointed for the purpose are often invested with special powers as conservators of rivers or harbors. Such boards are public corporations, in which the ownership or control of the works, structures or other property to which their duties relate is vested.

Governmental boards.

Local government.

111. The powers and functions of local government are thus apportioned among various municipal corporations and officers in a very confused way, not according to any general plan nor uniformly over the whole country, though much has been done lately by statute towards introducing order and system. The principal subjects with which it deals are police and the preservation of order, the care of highways and bridges, education, the poor, the public health, the sale of intoxicating liquors and local taxation.

Independence of local officers.

The general principle is that each local officer exercises an independent authority and is not subject to the control or supervision of the central executive government or of any official superior. There is no hierarchy of officers in graduated ranks. If a breach of his official duty by a public officer amounts to a crime, he may of course be prosecuted and punished for it; and if he commits a wrong against an individual or fails to perform a specific duty which he owes to an individual, the latter has his remedy in the courts.[10] Aside from this, the only check

[10] See § 1015.

upon such officials is the power of appointment and removal which is vested in the Crown or in case of some petty officers in the justices of the peace, or, for elective officers, the fear of displeasing the voters. But of late this principle has to some extent been departed from, and various departments of the government, particularly the Home Department and the Local Government Board, have been vested with considerable powers to interfere with and control the action of local authorities.

CHAPTER VI

THE CHURCH OF ENGLAND.

The church before the reformation.

112. Before the reformation in the sixteenth century the English church was a branch of the catholic church and acknowledged the supremacy of the Pope, who was sometimes represented in England by his legate. Frequent quarrels arose about the extent of the Pope's authority, particularly as to his right to entertain appeals from the English ecclesiastical courts, to appoint to offices in the English church and to tax the clergy. There were also disputes between the church and the civil authorities about the extent of their respective jurisdictions, the church claiming exemption from secular control and the right to try all clerks or clergymen accused of crime in her own courts, where the punishments inflicted were often farcical, as well as to punish laymen for various acts, for instance adultery and fornication, which, though not criminal by the common law, were regarded by the church as sins.[1] At the reformation however the English church broke away from the Roman church and repudiated the papal authority, and by statute the King was made the head of the church instead of the Pope. Since that time the church has been subject to the civil power, and its authority has been confined to ecclesiatical matters. Its articles of belief and its rites are regulated by acts of Parliament. There are other religious bodies in England, whose members are called dissenters or non-conformists. The non-conformist churches however are mere voluntary societies like churches in the United States.

Ancient ecclesiastical jurisdiction.

Present status of the church.

Dissenters.

Provinces.

113. For ecclesiastical purposes the country is composed of the two provinces of Canterbury and of York, each under an archbishop or metropolitan. The Archbishop of Canterbury is the higher in rank and is known as the Primate of England.

Archbishops.

[1] As the punishments in those cases consisted in or were commutable for pecuniary fines which went into the pockets of the ecclesiastical authorities, those courts were used as instruments of extortion and became very odious among the people.

Dioceses. **114.** Each province is divided into dioceses or sees, the province of Canterbury containing twenty-five dioceses and that Bishops. of York ten. Over every diocese is a bishop, who for certain legal purposes is called the ordinary, who has a general superintendence of the ecclesiastical affairs of the diocese, and in each there is a cathedral or principal church, to which is attached The dean and chapter. a chapter or council consisting of a number of canons with a dean at their head. The dean and canons perform divine service in the cathedral and advise the bishop in the affairs of the diocese. Archbishops and bishops were formerly elected by the chapters of their cathedral churches; and this usage is still observed in point of form, but the chapter is bound to elect the person nominated by the Crown. Under the bishop Archdeacons. are one or more archdeacons, who assist him or act in his place in various matters, and the archdeaconries are again divided Rural deans. into rural deaneries which are committed to the charge of rural deans. These officers are appointed by the bishop.

Parishes. **115.** The smallest ecclesiastical subdivision is the parish, which is generally, but not always, conterminous with a township or manor. Every parish has a parish church and a parish priest. The latter is called rector or vicar.

Rectors. A rector or parson (*persona ecclesiæ*) is one who not only has spiritual charge, or cure of souls, in the parish but also has full possession of its temporalities, the parsonage house, the glebe, or land set apart for the use of the priest, and the tithes[2] of the parish, in which he has an estate or property for his life. Appropriators. In certain cases however the right to the temporalities has become vested in various ways in some person other than the rector, who is known as an appropriator or impropriator. He is bound to provide a proper person to act as parish priest. Vicars. A person so appointed is called a vicar (*vicarius*), and a portion of the emoluments of the living are set apart for him, the re- Curates. mainder going to the appropriator. A curate is a priest hired to assist a rector or vicar or to perform his duties for him.

Wardens. Wardens or church wardens are officers of the parish who Vestrymen. have charge of its property, and vestrymen are its general executive officers. There is also a parish clerk. These officers

[2] See §119.

are appointed in different ways in different parishes according to custom. Some of the business of the parish is transacted in vestry meetings composed of the rate payers of the parish, which meetings correspond to the ancient township assemblies. Vestry meetings.

116. Ecclesiastical persons, called also clerks, clergymen, persons in holy orders or spiritual persons, are divided into bishops, priests and deacons, who take rank in the above order. A deacon can not administer the sacrament of the Lord's supper or hold a cure of souls, but he may be licensed to preach and baptize. Clerks are admitted to their office by ordination by a bishop. A clergyman can not be a member of the House of Commons, hold any municipal office, or while holding any ecclesiastical office engage in trade or farming. He is excused from serving on juries, and can not be arrested while performing divine service or on his way to or from it. Clergymen by statute are now permitted to renounce their orders, which formerly they could not do. Ecclesiastical persons.

117. Convocation is an ecclesiastical legislative assembly, composed of two houses, an upper House of Bishops and a lower House of Delegates representing the inferior clergy. It meets pursuant to a summons from the Crown. It can make canons, or ecclesiastical statutes concerning spiritual matters, which when approved by the Crown are binding on clergymen; but in order to bind the laity they must be affirmed in Parliament. Formerly the taxes of the clergy were imposed by themselves in Convocation, but that practice long since became obsolete. Convocation. Canons.

118. An ecclesiastical office with the income attached to it, for instance the rectorship of a parish, is called a benefice or living. The right to appoint or present a clerk to a living from time to time whenever the living falls vacant is an advowson, and the person having the advowson is known as the patron, who may be the King, the bishop or a private person. Very often the lord of a manor[3] has the right of presentation to the church upon the manor as an incident to his lordship, so that if he conveys the manor to another that right goes with it. Such an advowson is said to be appendant to the manor. Any other advowson is an advowson in gross.[4] But in every case a Benefices. Advowsons.

[3] See §453. [4] See §512.

patron must present a clerk who is canonically qualified to hold the position. The clerk on being presented by the patron is instituted by the bishop. If a properly qualified clerk is presented by the patron the bishop may be compelled by the ecclesiastical courts to admit him. If on a vacancy happening the patron neglects to present a clerk within a certain time, there is said to be a lapse, and the right of presentation passes to the ordinary, or on his neglect to the metropolitan, and ultimately to the Crown by the neglect of the metropolitan.

Lapse.

Advowsons are property.

An advowson is a species of property which may be freely bought and sold, and so is the right of making a single presentation, for instance the next presentation, which may be esparated from the advowson and sold by itself. But although the right to appoint to a living may be sold, yet for the clerk to pay or for the patron to receive any money or reward for the appointment of a particular person amounts to the crime of simony,[5] and makes the appointment void, the right of that presentation being forfeited to the Crown.

Simony.

Tithes.

119. Tithes are a kind of tax imposed for the benefit of the church. They are regularly payable to the rector of the parish and form an important part of the emoluments of his living, but sometimes to a vicar, and in certain cases the right to them has passed into the hands of an impropriator. Tithes are a tenth part of the annual profits of land or labor. Praedial tithes are of crops grown upon land, mixed tithes of the fruits or increase of stock kept upon land, and personal tithes of the income from trades or occupations. These last are in most places no longer payable. Land may be freed from tithes by a real composition, which is where some real property[6] has been given to the church in consideration of which the land is to be discharged from paying tithes; or by prescription[7] the tithes may be commuted for a fixed sum of money or some other payment in place of the regular tenth. Such a customary manner of tithing is called a modus (*modus decimandi*).

Compositions.

Modus.

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[5] So named from the offence of Simon Magus. Acts VIII, 19.
[6] See § 443. [7] See § 592.

CHAPTER VII.

THE UNITED STATES GOVERNMENT.

The old confederation.

120. After the separation of the thirteen English colonies, or states, in America from the mother country, they formed in 1782 a loose confederation under "Articles of Confederation and Perpetual Union," which provided for a federal Congress composed of delegates from the several states and an executive committee appointed by Congress. But the government thus set up was a mere representative of the states and had no ability to act directly upon individuals. It had no efficient executive, no courts of its own,[1] no power to levy taxes or enforce its laws by its own officers. It could only act through the instrumentality of the state governments, and if they refused or neglected to comply with its requests it was powerless. Because of its weakness it fell into contempt, and affairs were drifting toward anarchy, when in February, 1787, Congress advised the calling of a convention of delegates from the states to revise the articles of confederation and propose amendments to be ratified by Congress and the states. The convention met in May following, and coming soon to the conclusion that merely amending the articles of confederation would not be sufficient, assumed the task of preparing an entirely new constitution for the creation of a central government which should exercise its powers directly and independently of the state governments. The constitution provided that it should go into effect as soon as it was ratified by nine states. Eleven states ratified it promptly, and the new government of the United States of America was organized and went into operation in April, 1789. The other two states, North Carolina and Rhode Island, came in soon afterwards.

The constitutional convention.

The adoption of the constitution.

Amendments to the constitution.

121. The constitution provides for its own amendment.[2]

[1] It had authority to establish prize courts (see §193) and courts for the trial of piracies and felonies committed on the high seas.

[2] Art. V.

An amendment must be proposed by two thirds of each house of Congress or by a convention called by Congress on the application of the Legislatures of two thirds of the states, and must be ratified by three fourths of the states through their Legislatures or through conventions elected for that purpose. No convention to propose amendments has ever been called, but fifteen amendments have been proposed by Congress and added to the constitution.

The bill of rights.

The first ten amendments constitute what is often called the bill of rights. They contain provisions for the protection of the fundamental rights of individuals, and were adopted in 1791 in accordance with recommendations made by several states at the time of ratifying the constitution that a bill of rights be inserted in it. The eleventh and twelfth amendments relate to suits against states and to the method of electing the President and Vice-President. The last three were enacted after the civil war to abolish slavery and secure civil and political rights to the freedmen.

The later amendments.

The supreme law of the land.

122. The constitution, the laws of the United States made in pursuance thereof and treaties made under the authority of the United States are declared to be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. Therefore any provision in an act of Congress or a treaty which is not pursuant to and authorized by the constitution, or any provision in a state constitution or law which is contrary to the constitution, has not the force of law. It is said to be unconstitutional, and is wholly void; no court will enforce it, and any one may disobey it with impunity. It has often been supposed that this power of the courts to declare a legislative act void and refuse to enforce it was peculiar to American jurisprudence and that in America it was confined to the Supreme Court of the United States. But that is not so. Whenever in any country there is a supreme legislative authority and also inferior ones exercising only delegated powers, and their enactments conflict, those of the lower legislature must give way to the higher. Thus in England the King in Council or the county councils have certain legislative powers; but if a royal order in council or a rule made by a county

Unconstitutional laws.

Power of the courts to declare a statute void.

Is not peculiar to the United States.

council is contrary to an act of Parliament, it is of course void. The peculiarity of the American system is that the ordinary legislative bodies which make statutes have not the supreme legislative authority. That authority resides in the legislative bodies which can amend the constitution. In England Parliament is the supreme legislature, so that an act of Parliament is in all cases legally valid. The same principle, that an inferior law making body can not overstep the limits set to its authority by the sovereign, prevails in both countries, but in the United States the occasions for its application are more numerous and striking. And if a supposed law is really no law at all, it is necessarily the duty of any court before which the question may arise so to declare. The lowest court is as much bound as the highest to render judgment according to law, and therefore can not avoid deciding whether or not an alleged rule of law actually exists. But the inferior courts are extremely reluctant to hold a statute unconstitutional, and will never do so except in a very clear case. The courts however have no authority to pronounce upon the constitutionality of a statute unless a case involving the question is actually brought before them for decision. It is characteristic of the judicial power generally that it does not act of its own motion like the executive and legislative powers, but waits to be called upon. Nor will the courts knowingly permit a fictitious case to be made up for the purpose for testing the validity of a law; there must be an actual litigation.

The power is possessed by all courts.

The courts can not act of their own motion.

123. From the beginning there existed a wide difference of opinion as to the nature of the constitution and of the government which it created. The advocates of what was known as "state rights" or "state sovereignty" maintained that the constitution was merely a compact between the independent and sovereign states, from which any of the parties might withdraw at pleasure, and under which each state, since there was no superior authority to judge between them, retained the power to decide for itself whether any act of the central government was in violation of the compact. On the other hand what may be called the national party held the view that the constitution created not merely a

The nature of the Union.

The state rights doctrine.

The national-ist doctrine.

league of states but a true national government, whose powers were not derived from the states but directly from the people like the powers of the state governments themselves, that the Union was legally indissoluble, and that the authority to pronounce upon the validity of the acts of the national government abode only in the courts, and ultimately in the Supreme Court of the United States.[3] It would have been difficult, if not impossible, to have got the constitution adopted at all if it had distinctly enunciated either of those theories, so violent at the time of its making was the conflict of opinions and so great the jealousy among the people of a strong central government. As it was, only the pressure of dire necessity forced its acceptance upon a somewhat reluctant people. Therefore its language was purposely left ambiguous on that point. This was the great compromise of the constitution, in which were hidden the seeds of civil war.

Ambiguity of the constitution.

124. After the organization of the government this doubt remained. The discussion circled mainly about two questions: (1) The right of a state to nullify an act of Congress, that is, to prohibit its enforcement within the state, on the ground of its being opposed to the constitution; and (2) the right of a state to seceed from the Union. In 1832 the state of South Carolina passed an ordinance purporting to nullify certain laws of Congress relating to import duties, but repealed the ordinance almost immediately. In 1861 the southern states, fearing that the government would interfere with the institution of slavery which existed in those states, attempted to seceed and form a separate confederacy of their own. This led to a war between the national government and the seceeding states, which resulted in the victory of the government and the definitive establishment of the national theory of the constitution. It is now settled and acknowledged by all that the United States is a nation and not a mere league of states, and that there is no constitutional right of nullification or secession. If a state is ever to withdraw from the Union, it will not be under any legal right to do so reserved to it in the constitution but in the exercise of the extra-legal right of revolution.

The subsequent controversy.

Nullification.

Secession.

The United States is a nation.

[3] See § 204.

125. The government of the United States, though a true national government, is nevertheless one of limited powers. It is not intended that it shall perform all the functions of a government, but only certain ones. Most of the work of government is done by the states. The states are not provinces subordinate to the central government, but stand independently by its side, no more subject to its authority, except in a very few points specified in the constitution, than it to theirs. By the constitution the sovereign authority has created or adopted two sets of organs for expressing and enforcing its will, namely, the national government and the state governments, neither of which is superior to the other. The powers and functions of government are divided into two parts. One part is committed to the national government and the other to the states, and as a general rule neither can control or in any way interfere with the doings of the other.

The powers of the national government.

The states are independent.

The rule is that the national government has such powers only as are given to it by the constitution, while the states have all powers that are not taken away from them by the constitution; the unspecified residuum of governmental authority is in the states, not in the national government. Therefore in any case of doubt the presumption is against the jurisdiction of the national government and in favor of that of a state. This applies however only to the question, with what subjects the national government may deal, not to its manner of dealing with them. When it is once established that a certain subject is within its jurisdiction at all, it exercises as to that subject all the powers of sovereignty except so far as it is restrained by constitutional prohibitions.

Division of the powers of government.

Presumptions as to jurisdiction.

126. There have always been two schools of constitutional constructionists, the strict constructionists, who have insisted that the national government had no powers which were not expressly and in terms conferred upon it by the constitution and that even the express grants of power in that instrument should be strictly construed, and the liberal constructionists who have propounded the doctrine of implied powers, that is, that certain powers must be understood to have been conferred upon the national government in the constitution by implication though not

Strict and liberal constitution of the constitution.

in express terms, and have advocated a construction of the constitution according to its spirit rather than its strict letter.

Attitude of the courts.

The courts in construing the constitution have avoided the extreme positions of both schools, and have admitted, though cautiously, the theory of implied powers.

Powers expressly granted to the national government.

127. Generally those matters which are of common concern to the whole people or as to which it is important that there should be a uniform rule for the whole country are committed to the charge of the national government. The subjects expressly named in the constitution are the following:[4] foreign relations; war and peace; the army and navy; commerce, which here means not simply traffic but all intercourse, with foreign nations, with the Indian tribes,[5] and between the states; naturalization; bankruptcy; the coinage of money and the regulation of its value; weights and measures; the postal service; patents and copyrights; piracies and felonies on the high seas and the whole of the jurisdiction in admiralty; and the government of the District of Columbia, the territories and the national forts, magazines, arsenals, dockyards and other places owned by the national government. For those purposes the government may raise money by taxation or by borrowing, and it may make all necessary laws to carry into effect the powers entrusted to it.

Taxation and borrowing money.

Admission of new states.

Congress is required to guaranty to every state a republican form of government, and may also admit new states into the union. Many new states have been admitted, so that the number of states is now (1906) forty-eight.

Constitutional prohibitions.

128. Besides grants of power to the national government the constitution contains prohibitions of certain acts by the national government and also by the states. Some of these are of a public nature, intended to define more accurately the limits of national and state jurisdiction, to prevent unfair discriminations between the states or their citizens, to secure freedom of trade and intercourse between all parts of the country or to

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[4] Art. I, §8.

[5] The legal position of the Indians is peculiar. They are subject to the government, but they are usually permitted to retain their own tribal governments and laws. They are not citizens and do not pay taxes, and the national government makes treaties with the tribes as with foreign nations.

protect the political rights of citizens, or for other purposes of public interest, while others are intended to protect the private rights of individuals against arbitrary and tyranical violation. Most of the latter class of provisions and some of the former will be more conveniently noticed in connection with the special topics to which they relate in other parts of this work, but the following may properly be mentioned here.

General prohibitions.

Slavery is abolished.[6] Neither the United States nor any state shall grant any title of nobility,[7] set up any state church or deprive any person of life, liberty or property without due process of law.[8] The words life, liberty and property are here used to include all personal and private rights.

Prohibitions on the national government.

No preference is to be given by any regulation of commerce or revenue to the ports of one state over another. Freedom of religion, of speech and of the press, the right of peaceable assembly and petitioning the government, and the right of the people to keep and bear arms[9] are not to be infringed.[10] No soldier shall in time of peace be quartered in any house without the consent of the owner, or in time of war except in a manner to be prescribed by law.[11] Quartering soldiers upon them is a practice that has often been resorted to by tyranical governments to annoy or intimidate political opponents.

Provisions relating to the states.

129. Provisions relating to the states are as follows.[12] Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other, and Congress may by law provide how those shall be proved. The citizens of each state shall be entitled to all the rights of citizens in every state. Criminals fleeing from one state to another are to be given up; also fugitive slaves, but this is happily now of no importance.[13] No state shall make any treaty or alliance, grant letters of marque or reprisal,[14] coin money, emit bills of credit, make anything but gold and silver coin a legal tender in payment of debts, pass any law impairing the obligation of contracts, abridge the privileges or immunities of citizens of the United States, or deny to any person within its

[6] XIII Amend. [7] Art. I, § 9, 10. [8] V and XIV Amend. [9] See § 1176. [10] I and II Amend. [11] III Amend. [12] Art. I, § 10. [13] Art. IV. [14] See § 568.

jurisdiction the equal protection of the laws.[15] No state shall without the consent of Congress lay any import or export or tonnage duties, keep troops, *i.e.* regular troops as distinguished from militia, or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war unless actually invaded or in such eminent danger as will not admit of delay.

Form of the government.

130. The national government set up by the constitution is republication in form, but in the principles upon which it is based and its general plan it resembles the English government, from which indeed it was copied, though with various modifications to adapt it to the circumstances of the American people. The principles indicated in the English rule that the King can do no wrong apply in the United States to the national and state governments.

Legislative, executive and judicial powers.

Governmental powers are distinguished in the constitution as legislative, executive and judicial, and these are carefully separated and entrusted to different departments of the government. Nevertheless this separation is not and can not possibly be made complete. Various executive and judicial officers exercise the power to make rules, for instance rules of courts to regulate their own procedure, which to some extent have the force of law, but subject to the superior authority of Congress.

Congress.

131. The legislative authority is vested in Congress, which consists of a Senate and a House of Representatives.

The Senate.

132. The Senate is composed of two senators from each state; and the constitution declares that no state shall by any amendment to the constitution be deprived without its consent of its equal representation in the senate.[16] Senators are chosen by the Legislatures of the states for six years, but have been arranged by lot into three classes one of which goes out of office every two years. The Vice-President of the United States is president of the Senate, but has no vote except in case of a tie. The Senate chooses its other officers, such as a clerk and a sergeant at arms, who is its executive officer, and also elects a presiding

[15] XIV Amend.

[16] This is an attempt to make an irrevocable law. See §5.

officer *pro tempore* when the Vice-President is absent or when he is exercising the office of President of the United States.

The House of Representatives.

133. The members of the House of Representatives are elected directly by the people of the states, an entirely new House being chosen every two years. Each state has a number of representatives proportionate to its population, excluding Indians not taxed, the largest state now sending thirty-four representatives and the smallest one. A census of the United States is taken every tenth year, and it is the practice to make a reapportionment of representatives among the states after each census. The right to vote for representatives to Congress is enjoyed in each state by the same persons who are entitled to vote for members of the most numerous branch of the state Legislature, so that it depends upon the laws of the several states and is not everywhere the same. But the fourteenth amendment to the constitution, which was adopted after the civil war for the purpose of compelling the southern states to admit the recently emancipated negro slaves to the elective franchise, provides that if a state denies the franchise to any male inhabitants being citizens of the United States and twenty-one years of age, except for crime, its representation in Congress shall be proportionately reduced. That not being found effectual, the fifteenth amendment in 1870 enacted directly that the right of citizens of the United States to vote should not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude. The House chooses its own speaker, clerk, sergeant at arms and other officers.

The census.

The elective franchise.

Officers of the House.

Congressional elections.

134. Congress is empowered to regulate by statute the time, place and manner of choosing senators and representatives, except as to the place of choosing senators, which must necessarily be done at the place where the state Legislature meets. So far as Congress does not interfere, these matters, as well as the method of filling vacancies in the House of Representatives, are left to be determined by state laws. Congress has provided that each state shall be divided into congressional districts, from each of which one representative shall be chosen. The elections, which must be by ballot, are held on the Tuesday

after the first Monday in November of the even numbered years, so that once in four years they coincide with the presidential election. The new Congress comes into existence at noon on the fourth day of March following.

Powers of the houses.

135. Each house is the judge of the elections, returns and qualifications of its own members, and the houses have not thought fit to commit the decision on such matters to the courts as the English Parliament has done. A majority of each house constitutes a quorum for doing business, but a smaller number may adjourn from day to day and may compel the attendance of absent members. Each house may make rules for its own procedure, punish its members for disorderly behavior and by a two thirds vote expel a member. It must keep a journal of its proceedings and publish the same, except such portions as in its judgment may require secrecy. Congress must meet at least once a year, and neither house may without the consent of the other adjourn for more than three days nor to any other place than that where the two houses are sitting. Senators and representatives receive pay from the national treasury, they are privileged from arrest except for treason, felony, and breach of the peace, during their attendance at Congress and while going to and returning from it, and for any speech or debate in either house they shall not be questioned in any other place. No senator or representative can during the term for which he was elected be appointed to any civil office under the United States which has been created or the emoluments of which have been increased during such term, nor can any office holder under the United States be elected a member of either house.

Rights of members.

The manner of legislation.

136. A bill to become a law must be passed by both houses, and bills for raising revenue must originate in the House of Representatives but may be amended in the Senate. The consent of the President is also required before a bill can become a law. If he disapproves of a bill he may veto it, that is, may send it back to the house where it originated with a statement of his objections to it. If however it is again passed by a two thirds vote in both houses, it becomes a law notwithstanding the President's veto. The same

The veto power.

result happens if the President keeps a bill ten days, Sundays excluded, without either signing it or returning it to Congress, unless Congress has adjourned in the mean time.

The President and Vice President.

137. The executive power is vested in a President, who must be a natural born citizen of the United States.[17] There is also a Vice-President, who besides presiding in the Senate takes the place of the President in case of the latter's death or disability. The President and Vice-President are elected in the following manner, and hold office for four years.

Presidential electors.

Each state appoints in such manner as its Legislature directs a number of presidential electors equal to the number of its senators and representatives in Congress. Formerly in some states the electors were chosen by the Legislature, but now in all the states directly by the people, the qualifications of a voter being the same as for the choice of a member of the House of Representatives. The election is held, pursuant to a law of Congress, on the Tuesday after the first Monday of November every fourth year. The electors having been thus chosen, meet in their respective states and cast their votes for President and Vice-President, and certify their votes to the president of the Senate, who opens them in the presence of both houses of Congress and declares the result. Formerly each elector voted for two persons for President, and the person receiving the most votes was chosen President and the one receiving the next largest number Vice-President. But by the twelfth amendment to the constitution in 1804 that was changed, and the electors now vote for President and Vice-President separately. A majority of the votes of the electoral college is necessary for an election. If no person receives a majority, the President is chosen by the House of Representatives voting by states, the representatives from each state having one vote, and the Vice-President by the Senate. It was the intention of the framers of the constitution that the electoral college should be a genuine elective body and actually choose the President. And so it did for a short time at first. But now the practice prevails for each political party to nominate candidates for the presidency and vice-presidency and

The election of the President and Vice President.

Election by Congress.

Change in the character of the electoral college.

Party nominations.

[17] Art. II.

also to nominate electors who it is understood will vote for the candidates of their party. There is no law compelling the electors to do this, but any elector who should vote contrary to that understanding would incur disgrace, and in fact only two instances of it have ever occurred. Therefore in effect the people vote directly for the President and Vice-President. The President so chosen enters upon his official duties the fourth day of the following March at noon. By a recent statute, in case of the death of both President and Vice-President the members of the Cabinet, in an order designated in the law, are to exercise the powers of the President.

When the President's term begins.

Death of the President.

The rights and duties of the President.

138. The President receives a fixed salary which can not be increased or reduced during his term of office, and he is forbidden to receive any other emolument from the United States or from any state. The Vice-President also receives a salary.

Commander chief.

Treaties.

The President is commander in chief of the army and navy and of the militia when called into the actual service of the United States. He makes treaties with foreign states, but these must be made with the advice and consent of the Senate, which means that a treaty must be ratified by the Senate. The House of Representatives has nothing to do with the making of treaties, though if a treaty calls for the payment or expenditure of money, the necessary money must be voted by Congress, so that the House in some cases might, if it chose, prevent the carrying into execution of a treaty. The President appoints ambassadors, public ministers and consuls, judges of the United States courts, and all officers under the national government whose appointment is not otherwise provided for. These appointments are made with the advice and consent of the Senate. But Congress has power to vest the appointment of inferior officers in the President alone, in the courts or in the heads of departments, and to a large extent has done so. Admission to the civil service by competitive examinations, as in England, has been recently introduced. The power to appoint includes the power to remove. The assent of the Senate to a removal is usually given by assenting to the appointment of the successor. The President has power to call an extraordinary session of Congress at any time, but he can not prorogue or

Appointment of public officers.

Powers of the President as to Congress

dissolve Congress; that is, he has not the power to appeal to the country in case of a disagreement with Congress which the Government possesses in England. If however the two houses disagree as to the time of adjourning, he may fix the time. The constitution farther declares that the President "shall take care that the laws be faithfully executed," thus giving him extended executive powers.

General executive powers.

139. The President is advised and assisted by a council, generally known as the Cabinet, which is not provided for in the constitution but has been created by statute. Since the powers of the President are conferred upon him directly by the constitution and can not be taken away or limited by act of Congress, it follows that the President in executing his constitutional functions is not bound to take the advice of his Cabinet. He is the actual not merely the nominal executive, and the acts of the Cabinet are for the most part legally his acts, though in a few cases Congress has by law imposed duties or conferred powers directly upon members of the Cabinet. The Cabinet consists of the following officers, each of whom is the head of a department of the government for whose conduct he is responsible to the President, namely, the Secretary of State, who acts as a minister of foreign affairs, the Secretary of the Treasury, the Secretary of the Interior, who has special charge of home affairs, the Secretary of War, the Secretary of the Navy, the Secretary of Agriculture, the Attorney General, who is the chief law officer of the government and the head of the department of justice, and the Postmaster General. All these officers are appointed by the President, and each incoming President makes his own Cabinet. There is no Prime Minister. The members of the Cabinet are not, as in England, members of either house of Congress, nor do they or the President resign their offices on the happening of an adverse majority in Congress. The executive is not a mere committee of the legislature, but is an equal and independent branch of the government.

The Cabinet.

Independence of the executive.

140. The judicial power of the United States is vested by the constitution in a Supreme Court and such inferior courts as Congress shall ordain and establish.[18] The organization and

The national judiciary.

[18] Art. III.

jurisdiction of the United States courts will be explained in another place.[19] The judges hold their offices during good behavior, and their salaries can not be diminished during their continuance in office. Thus the judiciary is made a separate and independent branch of the government; and it has been decided that Congress has no power by law to impose or confer upon the judges any duties or powers not of a judicial nature.

Revenue.

141. The revenue of the national government is mainly derived from duties on imported goods and excise duties, which are collected by officers of the treasury department, and from the post office and sales of public land. Direct taxes on land and moveable property have been mostly left to the states.

Direct taxes.

The constitution provides that direct taxes shall be apportioned among the states in the same manner as representatives according to their population. There has been a good deal of doubt as to the exact meaning of the expression direct taxes. It is perhaps employed here in a narrower sense than it usually bears in political economy. Some high authorities have thought that it was intended to include only land and capitation taxes, but it has been recently decided by the Supreme Court that an income tax was a direct tax. All the money received goes into a general fund, and can be paid out only on appropriations made by Congress. There is no budget in the English sense, but the schemes of taxation and appropriations are prepared by committees of Congress.

Public expenditure.

The District of Columbia.

142. The District of Columbia is a small district containing the city of Washington, the national capital. It not in any state, and is under the immediate government of Congress.

The territories.

The territories are districts in the western part of the country that have too few inhabitants for a regular state government. They are subject to the national government, and are represented in Congress only by one delegate each, who is not a member of Congress and has no vote but attends to look after the interests of the territory. Their governors and superior judges are appointed by the President, but local affairs are usually managed by a legislature chosen by the people, by

[19] See § 200 *et seq.*

whom also local officers are elected. When the territories become sufficiently populous they are permitted to adopt state constitutions and are admitted into the Union as states. Most of the former territories have in this manner acquired statehood.

CHAPTER VIII.

THE AMERICAN STATE AND LOCAL GOVERNMENTS.

Form of the state governments.

143. In their form and general plan the state governments resemble the national government and each other; but they differ a good deal in details, so that only an outline account of them can be given here.

The state constitutions.

Each state has a constitution,[1] framed by a convention called for that purpose and in most cases adopted by a vote of the people. Amendments have to be proposed by the Legislature or by a convention and ratified by the people. The constitutions contain regulations as to the form and organization of the state government, and also bills of rights for the protection of individual rights and liberties. Subject to the provisions of the national constitution, a state constitution is the supreme law of the state, and any statute passed by the state Legislature which conflicts with it is unconstitutional and void.

The Legislature.

144. The legislative authority is vested in a Legislature, which consists of two houses, a Senate and a lower house usually called the House of Representatives but sometimes having some other name. Both senators and representatives are elected by the people for short terms, one or two years, and by the method of single districts, the senatorial districts being larger than those in which representatives are chosen because the number of senators is smaller than of representatives. A bill in order to become a law must pass both houses of the Legislature and be approved by the Governor. If he vetos it, it may be passed over his veto by a two thirds majority of both houses. Bills for raising revenue must in most states originate in the lower house. Each house is the judge of the elections, returns and qualifications of its own members, and has the power to preserve order and compel the attendance of its members. The

The course of legislation.

The veto power.

Revenue bills.

Powers of the houses.

[1] Some of the original states went on for some time after the separation from England under their old royal charters instead of constitutions.

members of the Legislature have the same rights of free speech and exemption from arrest as members of Congress. In some states the Legislature sits every year, in others once in two years. In no state has the Governor power to prorogue or dissolve it; but he may summon an extraordinary session if he thinks best.

Rights of members.

Sessions.

Powers of the Governor as to the Legislature.

145. The chief executive is the Governor, who is chosen by a popular vote for one or more years, the time being different in different states. A Lieutenant Governor is also elected, who presides over the Senate and takes the Governor's place in case of the death or disability of the latter. The Governor has in most states no council to assist him, the heads of the departments of the state government, such as the Secretary of State, the Treasurer, the Comptroller and sometimes other officers whose titles and functions vary greatly in the different states, being usually elected by the people and therefore independent of the Governor. The lower state officers are sometimes appointed by the Governor or by the heads of departments and sometimes elected by popular vote. In some of the states positions in the civil service are open to competition. Appointments by the Governor generally require the consent of the Senate. Judges are in most states elected by the people, but in some are appointed by the Governor or by the Legislature. Their appointments are usually for fixed terms, varying from one to fourteen years; but it has become a very general practice to reappoint or re-elect a judge who has done well. A state usually has an Attorney General or State's Attorney, who is its chief law officer and the legal adviser of the Governor and of the other high state officers. Sometimes there is a separate State's Attorney or District Attorney for each county.

The Governor.

The Lieutenant Governor.

Other state officers.

Judges.

Law officers.

146. In most of the states universal suffrage prevails; that is, every male citizen of the United States of full age and sound mind, who has resided one year in the state and a certain fixed time in the particular place where he wishes to vote, and is not disqualified by reason of crime or by receiving public support as a pauper, has the right to vote at all elections. In a few states a voter must be able to read or must hold a certain small amount of property; but those restrictions on the suffrage

The elective franchise.

are found in practice difficult to enforce and have generally been abolished. On the other hand there are states in which women or resident aliens are allowed to vote and even to hold office. Voting is everywhere by ballot. The election officers in each township or city make up each year a list of persons entitled to vote there, which is published. But in some places, especially in cities, where the voters, being numerous, are not personally known to the election officers, personal registration is required, that is, no person's name can be placed upon the list unless he personally appears before the election officers on a day fixed for that purpose and makes oath to his qualifications as a voter. A person whose name is not on the list can not vote. But if his name is wrongly placed upon the list, that does not give him a right to vote. He may be challenged, that is, objected to, at the polls by any one, and if he in fact votes or attempts to vote, he is guilty of a crime.

Registration.

The militia.

147. The states have no regular army or navy, but the militia is under their control, except when it is actually summoned by the President into the service of the United States. Congress however may, if it sees fit, make rules for its organization and discipline, that being a matter of national concern. The Governor of a state is the commander in chief of its militia.

Revenue.

148. The revenue of the states comes mostly from direct taxation. Land, including buildings, is taxed in the place where it is situated; other property in the place where the owner lives. In each township or ward of a city the assessors of taxes prepare lists of the persons who live or own land in the township or ward and of their property liable to taxation there. Any error in the assessors' lists may be corrected by an appeal to other officers usually known as a board of relief. All the individual lists of a township or other taxing district together make up its grand list. Taxes for state and local purposes are separate, the state and each township or city laying its own taxes according to its own needs. Generally all taxes are laid in the form of a percentage on the lists, there being no special taxes on particular kinds of property. Nor are separate taxes often imposed for particular purposes, except school taxes. All

Assessors of Taxes.

Board of Relief.

The grand list.

State and local taxes.

No special taxes.

Public expenditures.

ıe money received goes into a general fund from which all ıblic expenses are paid on appropriations by the legislature by local authorities. Some states however have a few special xes, of which the most usual kinds are taxes on the franchises corporations, legacy and succession duties, and license fees ır carrying on certain trades.

Collection of taxes.

All general taxes are usually collected by a single town- ıip or city officer known as a collector of taxes, who pays into ıe treasury of the state, county, city, township or other muni- pality the amount of the tax that belongs to each. Since state xes are laid on lists prepared by local officers, there is a mptation to those officers to undervalue the property in their stricts in order to evade their just share of the state taxes. o prevent this there are in some states state officers, sometimes lled a board of equalization, charged with the duty of revising ıe grand lists. They may add to or deduct from the grand st of any taxing district such an amount as they judge proper, hich amount must in turn be distributed proportionally among ıe individual lists comprised in that grand list.

Equalization of taxes.

Religion.

149. No state has any established church, though a few the older states formerly had them, nor is any religious test quired for holding office or for the exercise of any political civil right. Entire religious freedom and equality before the w of all religious are secured by the national and state con- itutions.

Independence of local officers.

150. In regard to local government the English prin- ple prevails that local officers are not under the supervision control of any official superiors. Each officer exercises an dependent authority, subject only to the law as enforced by e courts and in some cases to a liability to be removed from ice for gross misconduct. But most local officials are elected appointed for very short terms, usually a single year, so at they can be readily got rid of if they turn out incompetent misbehave themselves.

Counties.

151. The largest subdivision of the state is the county. s principal officer is the sheriff. He is the executive officer the courts and, as formerly in England, the chief con- rvator of the peace in his county, he and his under sheriffs

The sheriff.

and deputies constituting its ordinary police force. His judicial functions are very limited and in some of the states have quite disappeared, and the charge of elections has been committed to other officers. Coroners have substantially the same powers and duties as in England. Justices of the peace in the United States are almost exclusively judicial officers, their administrative functions being very few. The administrative business of the county is committed to a board of officers usually called supervisors or county commissioners. Every county has also a treasurer and a clerk. The sheriff and all the county officers are in most states elected by the people. The county taxes are generally voted by the legislature.

Coroners.

Justices of the peace.

County officers.

Taxes.

Townships.

152. Below the counties are the townships, which in the New England states are called towns. There are no parishes[2] or manors. Most of the affairs of the township are managed by a board of officers known as selectmen or trustees. In some states however these officers have only executive or administrative functions, the legislative business of the township, making by-laws and voting taxes, being done directly by the freemen or voters of the town assembled in town meeting, which is regularly held once a year and is presided over by a chairman elected by the meeting itself and called a moderator. The assessors and the collector of taxes and sometimes the board of relief are township officers. Each township has also a treasurer, a clerk and one or more constables, which latter have substantially the same powers and duties within their townships as the sheriff has in the county as executive officers of the courts, in some states only of the inferior courts, and peace officers. The conduct of elections is either in the hands of the ordinary township officers or of special election officers appointed by them. Township officers, like those of the country, are chosen by popular election, for the most part annually.

Selectmen.

Town meetings.

Township officers.

Subject matter of local government.

153. The most important subjects of local government are police, highways and bridges, public health, the sale of intoxicating liquors, public charity and the care of the poor, education, the conduct of elections and the assessment and collection of taxes.

[2] In Louisiana the counties are called parishes.

The township and county system.

The division of powers and functions between the county and township authorities is very different in different states. In the eastern and northern states what is called the township system generally prevails, the township with its officers being the most important governmental division and the county amounting to little more than a judicial and election district; while in the south and west the county system is preferred, the work of local government being mainly entrusted to county officers and the townships becoming of less importance.

Schools.

School districts.

154. Free public schools are established in all the states. These are generally managed by special school officers elected by the voters of the township. But in many states the townships are divided into school districts, each of which maintains its own school. The freemen of the district assemble once a year in a district meeting, elect their own school committee, vote the necessary taxes separately from the township taxes, and transact other business of the district.

Cities.

155. A city is a township or a part of a township, or even a group of townships or an entire county, which because of having a large number of inhabitants has been chartered by the state as a separate municipality and provided with a more elaborate system of local government than an ordinary township or county. Sometimes the city government entirely supersedes the township or county government, performing the functions of a township or county by its own officers, and sometimes the two governments exist side by side each working independently of the other. A city has a legislative assembly sometimes consisting of one chamber and sometimes of two, generally called a council or board of aldermen. Its chief executive officer is the mayor. It has a treasurer, a clerk and sometimes other officers. It maintains a police force of its own, independent of the sheriff, and usually a fire department for putting out fires. Not unfrequently cities undertake the business of supplying water or illuminating gas to their inhabitants or own and manage street railroads, public libraries and other works and property of public utility. The mayor and the members of the city council are always elected by the people. Other city officers sometimes are and sometimes are not.

Boroughs.

156. Boroughs are a kind of smaller cities, being places large enough to need something more than the simple organization of a township but not the more elaborate and expensive form of city government. They usually have a warden and burgesses instead of a mayor and aldermen, and their organization is simpler in most respects than that of a city. But a borough has substantially the same powers and functions as a city. In many states there are no boroughs.

Villages.

157. An incorporated village is smaller and more simple in structure than a borough or city, and its government usually possesses less extended powers. Its chief officers are generally a president and board of trustees.

CHAPTER IX.

COURTS.

Constituent parts.

158. The constituent parts of a court are the judge or ges, the triers of fact, the clerk, the executive officer and the yers.

The Judge.

159. The judge is the presiding officer of the court. Its hority is centered in him, he alone can make orders and nounce judgment. For that reason he is often spoken of as "court" in contradistinction from the triers of fact. If e is more than one judge, all decisions are by a majority . Questions of law arising in the course of a proceeding decided by the court, after argument by counsel if the parties re to be heard, while questions of fact are tried or investi- d and decided by the triers of fact.[1]

Triers of fact.

The jury.

160. In courts of common law the triers of fact are re- rly the jury. The jury consists of twelve men, not lawyers not permanently connected with the court, selected out of inhabitants of the county where the court sits. In legal seology they are said to be taken from the "body of the ty," and in pleadings they are spoken of as "the country." erally only taxpayers living in the county are competent to e on juries. Trial by jury is peculiar to the courts of com- law. In the other courts, and at present even in the mon law courts if the parties do not desire a jury trial, judge himself acts as trier of fact, or appoints persons called ees, auditors or committees, who are usually lawyers, to do In the equity courts there are or formerly were permanent ers entitled masters in chancery, whose principal business try minor and incidental questions of fact that may arise, thus save the time of the court.

Triers of fact in the civil law courts.

Masters in Chancery.

The clerk.

161. The clerk is the secretary of the court and keeps its ds and seal. All writs and documents that issue under

[1] As to the difference between questions of law and of fact, see § 231.

the seal of the court are signed by him. The chief clerk of a court is sometimes called the prothonotary.

The executive officer.

162. The executive officer of the court is usually the sheriff, but sometimes some other officer. Some courts have executive officers of their own called marshals.

Lawyers.

163. Lawyers in England are divided into two classes, those who are "admitted to the bar,"[2] often called collectively

The bar.

the "bar," and those who practice, as the phrase is, "below

Counsel.

the bar." The former are also known as counsel. It is their duty to conduct the actual trial of cases in court. They only

Barristers.

are allowed to address the court. Those who practice in the courts of common law are called barristers, in the old books *apprentici ad legem*, being looked upon as mere learners till they were of sixteen years' standing, after which time they might

Sergeants.

be admitted to the honorable degree of serjeants, *servientes ad legem*. Both serjeants and barristers may now practise in any court of common law, and the distinction between them seems to be purely honorary; but until 1845 only serjeants could practise in the court of Common Pleas. The judges of the superior courts are always admitted to the degree of serjeant

King's counsel.

before being advanced to the bench. From among these two degrees certain are selected to be King's counsel, the two

Attorney and Solicitor General.

principal of whom are called his Attorney General and Solicitor General. King's counsel are at liberty to carry on their private practice, but must not appear in any case against the Crown, *e.g.* for the defendant in a criminal prosecution, without

Advocates.

the royal license. Counsel who practise in the civil law courts are called advocates. Counsel are supposed, like the orators of

Remuneration of Counsel.

ancient Rome, to practise *gratis*, for honor and reputation, not for money, any compensation that they may receive from their grateful clients being regarded not as hire but as *quiddam honorarium*.[3] Therefore a counsel can not have any action

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[2] The word bar signified at first the railing which separated that portion of the court room to which the former class of lawyers alone were admitted from the remainder of the room.

[3] The same rule obtained at common law, but does not now, as to physicians, the professions of law and physic being regarded as too honorable to be practiced for pay.

against his client for his pay; nor on the other hand is he responsible to his client for negligence or want of skill.

The Inns of Court.

Up to about the 12th century the lawyers were chiefly priests. But on the establishment of the court of Common Pleas at Westminster[4] lay lawyers congregated there and bought for their use certain houses formerly belonging to noblemen, which were known as inns. The lawyers formed themselves into collegiate bodies, named from their respective Inns, and set up schools of law. The Inns are of two classes: Inns of Chancery, for students and beginners, and Inns of Court for lawyers of advanced standing. The Inns have power to admit persons to the bar. To be admitted a student must have kept twelve terms, during which he is supposed to spend his time in diligent study of the law. This however in time became a mere matter of form, and until recently all that a student was really required to do was to eat a certain number of dinners in the Inn and perform certain perfunctory exercises. Within a few years however courses of study have been established, and candidates for admission to the bar must pass examinations.

Admission to the bar.

Attorneys, solicitors and proctors.

164. The other class of lawyers, who are not admitted to the bar, were formerly called attorneys[5] in the courts of common law, solicitors in the courts of equity, and proctors (*procuratores*)[6] in the admiralty and ecclesiastical courts. Since the judicature act of 1873 the name solicitors has been applied to them all. They are officers of the court, admitted to practice by an order of the court, and enrolled in a book kept by the clerk. They are subject to the summary jurisdiction of the court, and may be punished for professional misconduct without the formality of a regular trial. They are the agents and representatives of parties in legal proceedings; they, and not the parties directly, retain and instruct counsel. It is the attorney's or solicitor's duty to prepare the case for trial, to make and deliver to the counsel a written brief containing the information

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4 See § 183.

5 The name attorney means agent; legal agents are distinguished as attorneys at law.

6 The name procurator is also used to denote an agent

which the counsel needs for trying the case, and to attend in court to assist the counsel by suggestions or information if needed.

Remuneration of attorneys.

An attorney, solicitor or proctor has a legal right to his fees and may sue his client for them; he is responsible to his client for negligence or want of competent skill.

Conveyancers and special pleaders.

Lawyers who devote themselves specially to drawing up wills, deeds, contracts and other documents are known as conveyancers, and those who make it their business to prepare written pleadings[7] as special pleaders. Conveyancers and special pleaders usually belong to the class of lawyers who are not admitted to the bar.

Lawyers in the United States.

165. In the United States the distinction between the two classes of lawyers is less marked. Every lawyer is admitted to the bar and also enrolled in the list of attorneys, after an examination, and is therefore capable of performing all the functions of any branch of the legal profession. He is called indifferently an attorney or counsellor. The title of barrister is not used, and those of advocate, solicitor and proctor only rarely The degree of sergeant does not exist. Every lawyer has a legal right to his fees and is bound to use care and skill, whether he acts in the capacity of attorney or counsel.

The crier.

166. The crier of the court is a servant or attendant, whose name is derived from his duty to announce in a loud voice the opening and closing of the court and to call out the titles of cases as they are reached for trial and the names of persons, such as parties, jurors or witnesses, whose presence is required.

Receivers.

167. A receiver is a person appointed by the court to have the custody of property which is in dispute or which is to be kept or disposed of by the court. A receiver is appointed when there is danger that the party in possession may destroy, damage or wrongfully dispose of the property pending the proceedings. He is a kind of trustee, is subject to the orders of the court, is required to give security for the faithful performance of his trust, and is entitled to a reasonable compensation for his services, which is fixed by the court.

Powers of courts.

168. A court has authority, except so far as it is restrained by statute, to make rules for regulating its own procedure and, if necessary, to devise new forms and methods of procedure.

[7] See § 1043 *et seq.*

But this does not empower it to invent new rights or remedies belonging to the substantive law.

Superior and inferior courts.

169. Courts are divided into superior and inferior; there is however no definite line to be drawn between the two kinds. Generally the name superior is given to the more important courts, those which have jurisdiction to any amount, while those whose jurisdiction is confined to petty cases are called inferior. In England the superior courts are those that sit at Westminster. A court is inferior to any other to which an appeal lies from its decisions, and superior to any from which an appeal can be taken to it.

Courts of general and limited jurisdiction.

170. A court of general jurisdiction is one that has power to hear all kinds of cases, or all kinds of cases belonging to a particular division of the law, such as cases at common law or in equity, except those which it is specially forbidden by law to hear; whereas a court of limited jurisdiction has power to hear only such cases as it is specially authorized by law to hear. With the former class jurisdiction is the rule and the want of it the exception, the presumption is in favor of the jurisdiction, and if any party asserts that the court has no jurisdiction, he must prove it; but with a court of limited jurisdiction the presumption is the other way, and if its jurisdiction is disputed it must be shown.

Courts of record and not of record.

171. Courts of record are those of whose proceedings a written history or record is required to be kept by the clerk. Such a court must have a seal. If it ever becomes necessary to prove the doings of the court, either in the same or in another court, the only admissible mode of proof is the production of the record itself or a certified copy of it under the signature of the clerk and the seal of the court. A court not of record is not required by law to keep any record of its acts. Its doings must be proved by witnesses like any other fact. At present only a few very inferior courts, such as police courts or courts of justices of the peace, are not of record, though formerly the court of admiralty and at present the ecclesiastical courts in England are not technically courts of record, although they in fact keep records.

Courts of original and of appellate jurisdiction.

172. A court of original jurisdiction, otherwise called a

court of first instance, is one in which a suit may be originally brought. An appellate court is one to which appeals from other courts can be taken. Often the same court has both kinds of jurisdiction.

Terms and vacations.

173. The courts do not usually sit every day for the trial of cases, but have certain periods, called terms, during which they sit, with vacations between. The terms of the English common law courts have from ancient times been fixed according to certain feast days of the church or saints' days, and are known as Hilary, Easter, Trinity and Michaelmas terms, beginning respectively in January, April, May and November. The American courts hold their terms at various times according to the amount of their business, sometimes every month and sometimes at longer intervals.

Business other than trials.

Chambers.

The clerk's office is always open for the transaction of such business as does not require the attention of the judge; and both in term time and vacation a judge usually sits in chambers, that is, at some convenient place appointed for that purpose, for business other than the trial of cases, such as making orders or granting writs which are not issuable by the clerk without a special order. Orders made by the judge at chambers or anywhere out of court were not at common law regarded as orders of the court, and could not be enforced except by turning them into rules of court, that is, obtaining from the court an order or rule to the same effect, which could only be done in term time. At present such orders are sometimes deemed to be acts of the court and sometimes not, a distinction being still made between the orders of the court as such and those of an individual judge. But the latter will be enforced by the court.

Orders.

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CHAPTER X.

THE ENGLISH COURTS.

Ancient English Courts.

174. There were anciently in England three kinds of rts, the popular courts, the private courts and the King's rts.

The popular courts.

The popular courts were assemblies of the people, which only acted as courts in the proper sense but also posed administrative and to some extent legislative powers. constitution of the County Court and its functions as an inistrative body have already been spoken of.[1] This class ourts were of great antiquity, having existed among the lish tribes before they settled in Britain. When they sat ourts the whole body of the suitors were the judges, though convenience, sake a part of their business was generally sacted by a small number of selected persons, frequently ve, from which is derived the number of the jury in modern s.

The Hundred Court.

175. The Hundred Court was an assembly similar in its position to the County Court, and was held once a month ach hundred, having a general jurisdiction at common law court of first instance. It fell into desuetude some cens ago, though not formally abolished by statute until 1867. a session of it held under the presidency of the sheriff, nally for the "view of frankpledge," that is, to see that y man was properly enrolled in a frankpledge or tithing,[2] nued to exist until modern times as a petty criminal court the sheriff for judge under the name of the Sheriff's n.

The Sheriff's Tourn.

The County Court.

176. The County Court in its judicial capacity heard ap- from the Hundred Court and other inferior courts, includgenerally the private courts, and also to some extent ised original jurisdiction, especially in important cases.

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[1] See § 101. [2] See § 104.

The Sheriff's Court.

It underwent in course of time a double transformation. (1) Its ordinary sessions came to be held by the sheriff alone, the suitors ceasing to act as judges, so that it was known as the Sheriff's Court, in which form it lasted as a court for the trial of petty civil cases until 1846. (2) On certain occasions justices from the King's Court sat in it, making it practically a branch of the royal court as will be hereafter explained.[3]

The Borough Courts.

177. The Borough Courts or Hustings were courts of the same nature held in boroughs whose charters granted them exemption from the jurisdiction of the hundred or county.

The private courts.

178. The private courts were the courts of the manors and liberties, which will be described in another place.[4] It is sufficient to say here that certain feudal lords obtained from the King the right to administer justice within their own domains and to set up courts of their own for that purpose, whose jurisdiction was sometimes concurrent with and sometimes exclusive of that of the public courts. These courts resembled in composition the popular courts, the suitors, who acted as judges under the presidency of the lord's representative, being the body of the lord's vassals.

The King's Court.

179. Among the other prerogatives of the King was that of administering justice. He was called the fountain of justice. This power he usually exercised in his Council, sometimes in the Great Council but more often in his smaller Council, the so-called King's Court, or the Council exercised it in his name. He might act as judge in any case if he chose; but at first the royal court as a rule only took cognizance of cases in which the King was in some way concerned, such as revenue cases,

Pleas of the Crown.

criminal cases, which were called pleas of the Crown,[5] and actions for trespasses, or private wrongs done with violence, which involved a breach of the peace and therefore concerned the King in his capacity of keeper of the peace and for which a fine or amercement was due in ancient times to the King

Common pleas.

as well as compensation to the injured party. Common pleas, that is, ordinary suits between private persons, such as actions for debts, regularly went into the popular or private courts,

[3] See § 185. [4] See § 454.

[5] The word plea here means a suit or action.

nd indeed those courts often exercised criminal jurisdiction s well, the King not always insisting upon his prerogative n such cases.

Growth of the royal courts.

However in course of time the royal courts gradually lrew to themselves nearly all the judicial business of the ountry, the other courts losing most of their importance. There vere two principal reasons for this. The first was the profits ccruing from the administration of justice, consisting in fees aid by litigants and fines imposed by the court, which the King lesired to appropriate and which formed no inconsiderable part f the royal revenue. The second reason was that the King's Court was a better court than the popular or private courts. The judges, instead of being a miscellaneous collection of people, vere the more intelligent and able men who composed the King's Council, and naturally the judicial work of the Council ell more and more into the hands of those members of it who vere learned in the law, until at last, as will be seen, special udges were appointed. Also in many cases where the wrongloer was a great lord or other powerful man the popular courts vere unable to enforce justice against him, a difficulty which lid not exist, at least to so great an extent, in the King's court. It appears too that the procedure of the royal court was often speedier than that of the popular or private courts.

Plaints.

180. When the suit fell regularly within the jurisdiction of the King's Court, it was begun by presenting to the court a plaint or complaint, upon which the court at once took jurisdiction of the matter.

Common pleas in the King's Court.

But the prosecution of common pleas in the King's Court was not at first a matter of right but of grace. The King was not bound to trouble himself about private disputes unless he chose to. He took advantage of this to exact money from suitors for the privilege of using his court, which in the time of King John, when suing in the King's courts had come to be regarded as a matter of right, gave rise to the provision of *magna carta* against selling justice. A person who desired to sue in the King's Court had to obtain from the King a writ enabling him to do so. The word writ (*breve*) is a general name for a mandate issued by the King or by a court

Royal writs.

directed to a public officer or private person commanding him to do or omit some act. The royal writs were issued from the Chancery under the great seal. The writs by which actions in the King's courts were begun were called original writs, had at the end a *teste* or clause signifying that they were issued in the King's name—"Witness ourself at Westminster," or at whatever place the King was—and were generally directed to the sheriff ordering him to notify the defendant to appear before the court on a certain day to make his defence. Without the authority of such a writ the court would not entertain the case.

Original writs.

The Court of King's Bench.

181. By the time of Henry II the judicial business of the King's Court or Council had increased so much as to interfere with its administrative work. He therefore delegated the hearing of ordinary cases to a committee of that body presided over by the Justiciar, reserving specially difficult matters for the decision of the entire Council. Thus arose the court of King's Bench (or Queen's Bench) as a separate tribunal. This court, being still in theory the King in Council, though in fact entirely distinct from the Council, represented in a special manner the King himself in his judicial capacity. Legally the King was deemed to be always present in it, and its proceedings were described in technical language as had before the King himself. The last monarch who attempted actually to sit in it was James I, but the judges informed him that it would not be lawful for him to take any active part in its proceedings. It was composed of a chief justice, who was called the Chief Justice of England and was the successor of the ancient Justiciar, and four *puisne* or associate judges. It was the highest in rank of all the courts of common law, and besides its original jurisdiction had an appellate and supervisory jurisdiction over all inferior courts, magistrates and corporations, which it exercised by means of various writs that will be hereafter described. As depositaries of the King's authority as keeper of the peace, its judges had the powers of magistrates and peace officers in all parts of the kingdom.

Jurisdiction of the King's Bench.

The Court of Exchequer.

182. The Exchequer in the course of its business of collecting the royal revenue exercised the powers of a court in deciding controversies relating thereto. And since it was not

at first clearly distinguished from the Council, the other judicial business of the Council was sometimes transacted there. Thus in time grew up a separate court known as the court of Exchequer, distinct from the Council on the one hand and from the ordinary Exchequer on the other, whose judges however retained the old name of barons of the Exchequer. Later they were fixed as a chief baron and four *puisne* barons. About the time of the establishment of the court of Common Pleas the Exchequer was forbidden by statute to hear common pleas; but it afterwards regained that jurisdiction.

The King's Bench followed the King.

183. The King's Bench followed the person of the King, holding its sessions wherever he happened to be, so that writs summoning persons to appear before that court always commanded their appearance before the King himself wherever he should be in England. That being found inconvenient, it was provided in *magna carta* that common pleas should be held at some fixed place. This led to the establishment of a new royal court, the court of Common Pleas or Common Bench, which was made up of a chief justice of the Common Pleas and four *puisne* justices and sat at Westminster, where also the King's Bench and Exchequer in course of time settled down, and where all three continued to be held.

The Court of Common Pleas.

The superior courts of common law.

184. Those three courts, the King's Bench, Exchequer and Common Pleas were called collectively the superior courts of common law. After the foundation of the Common Pleas that court had regularly jurisdiction of private suits, the Exchequer of revenue cases, and the King's Bench of pleas of the crown and of private actions for trespasses. But by means of two audacious fictions the other two courts contrived to get concurrent jurisdiction with the Common Pleas over all private actions except real actions.[6]

Jurisdiction of the superior courts.

Encroachments of the King's Bench.

The King's Bench always had the right to entertain a suit against any one who was in the custody of its marshal or executive officer and was therefore theoretically present in the court. A plaintiff desiring to sue in that court was permitted to begin a suit against the defendant for an imaginary trespass and also (*ac etiam*) for a debt or other private cause of action.

[6] See § 1038.

The defendant, being then supposed to be arrested by the marshal for the trespass, could be proceeded against for the debt. In the Exchequer the plaintiff presented a plaint alleging that he was the King's debtor and that the defendant unjustly refused to pay him money which he owed him or had wronged him in some other way, by which he was the less (*quo minus*) able to pay his debt to the King, and the court, not permitting this false allegation to be disputed, took cognizance of the action as incidental to its proper business of collecting the King's revenue. In modern times therefore a plaintiff could generally bring his action in whichever court he chose.

Encroachments of the Exchequer.

The Circuits.

185. At a very early period the judges of the King's courts used to visit the County Courts from time to time for the purpose of hearing pleas of the Crown and transacting business connected with the King's revenue. Henry II divided the country into circuits and assigned a number of judges to each circuit. It was found convenient to have cases which were pending in the royal courts tried before the circuit judges rather than put the parties and their witnesses to the trouble of coming to Westminster or wherever the King might be; and this became the regular method of trial. In later times two judges from the superior courts of common law were sent several times a year into each circuit, one to hold a court for the trial of civil cases and the other a criminal court. The circuit judges sit by virtue of four separate royal commissions. (1) A commission of *nisi prius*, authorizing them to try civil cases. This name arose in the following manner. The suit was begun and in theory was to be tried in the court at Westminster. When however it was ready for trial an order of the court was made directing that it be tried on a certain day before the full court unless before (*nisi prius*) that day the circuit judges came into the county where the trial was actually intended to be had, in which case it was to be tried there. A day was of course designated before which the judges would be sure to be in that county. From this practice the civil court held at the circuit is called a court of *nisi prius*; and any trial before a single judge with a jury is now known both in England and the United States, even in states where the circuit system does not prevail, as a trial at

Nisi prius.

nisi prius. In contradistinction the sittings of the full court are called in both countries sittings in banc (*in banco*). (2) A commission of oyer and terminer, authorizing them to hear and determine certain kinds of criminal cases, from which the criminal court is often called a court of oyer and terminer, and the same name is sometimes used as a title for courts of criminal jurisdiction in the United States. (3) A commission of jail delivery, authorizing them to deliver or clear the jails of persons confined there and awaiting trial on accusations of crime. (4) A commission of assize, authorising them to take cognizance of certain ancient proceedings known as assizes, which are now quite obsolete. From this last is derived the name of the "assizes," by which the sittings of the circuit judges are still most commonly designated.[7]

Sittings in banc.

Oyer and terminer.

Jail delivery.

Assizes.

186. By a statute of Edward III a court known as the court of Exchequer Chamber, *Camera Scaccarii* (*Cam. Scac.*), was organized to hear appeals from the court of Exchequer. In the time of Elizabeth jurisdiction over appeals from the King's Bench was given to the Exchequer Chamber, appeals from the Common Pleas still going, as at first, to the King's Bench. By statutes of George IV and William IV the old court was abolished and the modern court of Exchequer Chamber set up in its place as an appellate tribunal over all three of the superior courts of common law. Its judges were all the judges of the three superior courts, but the judges of any court did not sit on appeals from their own court, so that practically the appellate tribunal for each of the three courts was composed of the judges of the other two.

The Court of Exchequer Chamber.

187. From the Exchequer Chamber an appeal lay to the House of Lords, *Domus Procerum* (*Dom. Proc.*), which was thus the highest common law court of the kingdom. Appeals from the courts of Scotland and Ireland have also come into the House of Lords since the union of those kingdoms with England.

The House of Lords.

Beside the ordinary jurisdiction of the House of Lords as a court of appeal, it sometimes acts as a court of original jurisdiction in the trial of impeachments. An impeachment is an accusation preferred by the House of Commons to the House

Impeachments.

[7] See § 1099.

of Lords against a person for some serious crime. The trial is before the House of Lords. This procedure was formerly often resorted to in cases of treason or other grave crimes against the King or the state, but has not been used now for a long time.

Court of the Lord High Steward.

The court of the Lord High Steward is a court held before the officer of that name[8] with the assistance of the members of the House of Lords, for the trial of peers accused of treason or felony.

The common law court in Chancery.

188. There is also an ancient court of common law in the Chancery, of which the Chancellor is the judge. It formerly exercised jurisdiction in a few classes of cases; but as it had no power to summon a jury, it was necessary whenever a question of fact was to be tried to send the case for trial into some one of the other law courts, so that this court fell into desuetude. In this court the great seal is kept and from it writs are issued; that is, the custody of the seal and the issuing of writs belong to the common law functions of the Chancellor not to his functions as an equity judge.

Extraordinary jurisdiction of the King.

189. The differentiation of the regular royal courts of common law from the Council did not drain off all judicial authority from the King. He still retained the right to administer justice. It has already been remarked that when Henry II established the tribunal that afterwards became the King's Bench he reserved difficult cases for the Council. People therefore who for any reason could not get satisfaction in the regular courts continued to apply to the King for relief; and he, if he saw fit, granted them writs commanding that justice should be done. Hence arose a distinction between writs. The ordinary writs simply authorizing the bringing of a suit in the King's courts came to be a matter of right. They assumed fixed forms, were issued by the clerks of Chancery without any special order from the King to any one who applied for them, and were known as writs "of course" (*de cursu*). Certain fees were charged for them, so that a person was said either to "sue out" a writ or to "purchase" a writ. Sometimes also the authority of the King was resorted to merely to compel

Writs of course.

[8] See §82.

the ordinary courts to do their duty. If a court wrongfully refused to entertain a cause at all or improperly delayed the proceedings, the King could grant a writ ordering it to go on. In some classes of actions it became the regular practice to begin an action in the popular or private courts by means of such writs. These were called writs of justicies, and became writs of course at a very early period. They were sometimes used to confer upon an inferior court in a particular instance authority to hear a case of which it would not ordinarily have jurisdiction; for instance the King by such a writ might command the Sheriff's Court to try a case that would regularly have gone to some other court. In this use they were not of course. Writs of justicies.

Besides writs of course there were extraordinary writs granted by the King at his pleasure, by which he gave relief outside of the forms of law, commanding persons by an arbitrary exercise of his authority to do or forbear from acts. These extraordinary writs never became of course but always required a special order from the King or his Council or from the Chancellor for their issue. They, and the irregular and arbitrary judicial authority of the King of which they were the expression, gradually became extinct as the constitution settled into regularity and the powers of the various courts were extended and better defined. Out of this residuum of judicial power in the King's hands after the courts of common law branched off several courts arose which must now be considered. Extraordinary writs.

190. One ground of application to the King in his Council was the poverty of the applicant, which prevented him from pursuing his remedy in the ordinary courts, or the preponderant wealth and power of the party complained against. Such cases the Council took cognizance of and disposed of in a summary manner. Henry VIII ordered two members of his Council to sit daily to hear poor men's complaints. This developed into the Court of Requests which sat at Whitehall, but which was practically suppressed in 1598 by a decision of the court of Common Pleas that it was not a legal court. Court of Requests.

The Council also claimed and exercised for a long time a jurisdiction to punish crimes against the government or public order, frauds and conspiracies and various other offences. By The Star Chamber.

the end of Elizabeth's reign most of this jurisdiction had come to be exercised by a tribunal partly at least distinct from the Council, the famous court of Star Chamber. This court, which proceeded in a summary way without trial by jury, was used by the first two Stuart kings as a powerful instrument of tyranny, inflicting very severe punishments in an arbitrary fashion. It thus became very odious, and was abolished by the Long Parliament in 1640.

The Court of Chancery.

191. But the most important outgrowth of the King's extraordinary judicial authority was the equitable jurisdiction of Chancery.

Inadequacy of common law remedies.

At a very early period the forms of procedure in the common law courts became fixed and rigid, and as in the course of the development of society the relations between men grew more complicated and a more exact adjustment of legal remedies to these was called for, those courts found themselves unable to supply it. A great many cases arose in which the common law courts were unable to do complete justice. In such cases re-

Petitions to the King.

course was had to the still wide and undefined royal prerogative. People who were aggreived and could not get redress at law applied to the King by a petition or, as it was called, a bill, praying for his help. These petitions the King got into the habit of handing over to the Chancellor, the keeper of his conscience, who after such investigation as seemed to him necessary, made a proper order or decree in the King's name. In the reign of Edward III an order was made that all matters which were "of grace," should be referred to the Chancellor; and in

Petitions to the Chancellor.

time the practice naturally grew up of presenting petitions or bills directly to the Chancellor in his court of Chancery instead of to the King. In early times some applications based not upon the inadequacy of the remedy at law but upon the defendant's being a powerful man able to defy the power of the courts or upon the poverty of the applicant took this same course. But this practice ceased so long ago that it need not be farther noticed; such reasons do not now and have not for some centuries formed any ground for a resort to Chancery. The introduction in the reign of Edward III of uses,[9] which

[9] See Chapt. XXX.

the courts of law would not enforce at all, greatly extended this equitable jurisdiction of the Chancellor. A writ known as a *subpoena* was invented, according to some accounts by John Waltham, bishop of Salisbury, Chancellor under Richard II, by which the defendant was summoned to appear before the Chancellor and make answer to the bill, and a regular course of procedure in equitable actions was gradually evolved. For a long time the relief given was arbitrary and irregular, largely at the Chancellor's discretion, which, as was derisively said, was all the same as if it were according to the length of the Chancellor's foot. But when the office of Chancellor came to be regularly filled by lawyers more orderly and legal methods prevailed. The former decisions of the court were followed as precedents, fixed principles and rules were established, and gradually an entire new system of law was developed which was and still is known by the name of equity.[10] Lord Nottingham, who was made Chancellor in 1673, reduced the practice of the court to order and laid the foundations of the modern law of equity, which has since been extended and improved.

The writ of *subpoena*.

Reduction of equity to a system.

192. About the time of Henry VIII, the business of the court becoming too heavy for the Chancellor alone, the Master of the Rolls, or chief clerk of the court, began to act as a judge; and afterwards by statute of George III a Vice-Chancellor was appointed, and two more Vice-Chancellors have been added in the reign of the present Queen. Formerly the Chancellor heard appeals from the Master of the Rolls and the Vice-Chancellors, who as acted judges of first instance. But in 1851 a Court of Appeal in Chancery was created, consisting of the Chancellor and two Lords Justices of Appeal. All these were subdivisions of the court of Chancery, which was a single court.

The Master of the Rolls.

Vice Chancellors.

Court of Appeal in Chancery.

There was also a court of equity in the Exchequer besides the ordinary common law court. Some petitions for extraordinary relief seem, in the confusion between the different departments of the government which prevailed, to have gone to the barons of the Exchequer instead of to the Chancellor. But that court never did much business, and was abolished in 1841.

The Court of Equity in Exchequer.

[10] See § 88.

House of Lords.

The House of Lords was the ultimate court of appeal from the courts of equity as well as from those of common law.

The Court of Admiralty.

193. The court of Admiralty is said to have been originally instituted by king Edward III. It was held before the Lord High Admiral of England or a judge who was his deputy. There are really two separate courts included under the common name of the court of Admiralty, the Instance Court and the Prize Court. The former is the ordinary court, which administers the maritime law. The latter is a special tribunal only existing, or at least only acting, in time of war, whose function it is to adjudicate upon questions of prize, that is, of the lawfulness of captures made from the enemy and the disposition of the captured property.[11] There are also Vice-Admiralty courts in the colonies.

The Instance Court.

The Prize Court.

Vice Admiralty Courts.

Appeals from Admiralty.

The appeal from the court of Admiralty was formerly to the King in Chancery, the appeal being heard by a Court of Delegates commissioned by the King for that purpose. But by a statute of William IV all appeals from the Admiralty and Vice-Admiralty courts were to be taken to the King in Council, *i.e.* to the Privy Council.

The Privy Council.

The Privy Council is also the ultimate court of appeal from the courts of the English colonies. The powers of the Privy Council as a court are exercised by what is known as the Judicial Committee of the Council, composed of lawyers appointed members of the Council for that purpose.

The new County Courts.

194. The new County Courts are courts established in the counties pursuant to a statute passed in 1846. They are courts of limited civil jurisdiction at law, in equity and in admiralty for the disposal of small cases. They have no connection with the ancient County Courts.

Courts of Bankruptcy.

195. Formerly cases of bankruptcy came before commissioners appointed by the Chancellor, and appeals might be taken to Chancery. But in London a court known as the London Court of Bankruptcy had for a long time existed, and by statute in 1869 it was given jurisdiction in bankruptcy within what is designated as the London district. The rest of

[11] See § 568.

the country is divided into bankruptcy districts in which the County Courts act as courts of bankruptcy.

Justices of the peace in Quarter and Petty Sessions try minor criminal cases; but these officers in England have no jurisdiction over civil actions. There is now also a Central Criminal Court in London. Justices of the peace. Central Criminal Court.

196. The duchies of Cornwall and Lancaster and the counties of Durham and Chester, which latter are called counties palatine, were formerly under the jurisdiction of their own dukes or earls, who enjoyed therein certain royal rights and prerogatives, among the rest the right of holding courts of their own resembling the royal courts. Some of those courts still remain. Courts of duchies and counties palatine.

Scotland, Ireland, the Channel Islands and the Isle of Man have also their separate courts. Scotch and Irish courts

197. Besides the above described courts there are a few others of which a mere mention will suffice. These are the courts of the two universities of Oxford and Cambridge, held before the vice chancellor of the university or his deputy, having jurisdiction over most causes in which students are parties, and proceeding according to the forms of the civil law; the city courts of London and other cities; the courts of *Pie Poudre* and of the Clerk of the Market, the former a court of civil and the latter of criminal jurisdiction, held in fairs and markets to dispose expeditiously of petty disputes arising and petty crimes committed there; the Forest Courts, which were formerly held for the transaction of various business connected with the management of the royal forests and the punishment of offences against the forest laws; the court of the Marshalsea and Palace Court at Westminster, having jurisdiction of certain causes in which the members of the royal household are concerned and certain offences committed in or near to the royal palaces; the Court of Policies of Insurance which formerly existed in London for determining in a speedy and summary manner disputes about insurance contracts; and the Stannary courts in Devon and Cornwall for hearing suits by and against persons engaged in tin mining in those counties. Certain minor courts.

198. The ecclesiastical courts remain to be considered. The Ecclesiastical Courts.

Before the Norman conquest there were no separate church courts. The bishops sat in the popular courts, and ecclesiastical causes were tried there. But William I forbade this; from which resulted the establishment of the ecclesiastical courts.

The Archdeacon's Court.

The Archdeacon's Court is held in each archdeaconry before a judge appointed by the archdeacon and called his official, and is the lowest in rank of all the ecclesiastical courts. An appeal lies from it to the Consistory Court.

The Consistory Court.

The Consistory Court is the court of the bishop of each diocese. The bishop's chancellor or his commissary is the judge.

The Court of Arches.

The Court of Arches, whereof the judge is the dean of the arches, so called because he formerly held his court in the church of St. Mary *le bow* (*de arcubus*), is a court of appeal belonging to the archbishop of Canterbury. It hears appeals from all inferior ecclesiastical courts in the province. The principal official of the archbishop of York has a similar court for his province.

The Court of Peculiars.

The Court of Peculiars is a branch of the Court of Arches and has original jurisdiction over certain parishes which are exempted from the jurisdiction of the bishops.

Probate courts.

The Consistory Courts were the ordinary courts for the probate of wills and the granting of administration on the estates of deceased persons. But if the deceased left *bona notabilia*, that is goods of the value of 200 shillings or more, in two or more different dioceses, the probate belonged to the archbishop, and was granted in his Prerogative Court, which was held before a judge appointed by him.

The Prerogative court.

Appeals in ecclesiastical cases.

From the archbishop's courts the appeal was originally to the Pope, but after the reformation to the King as the head of the church. This jurisdiction the King exercised by commissioners called the Court of Delegates, as in the case of appeals from Admiralty, but it has now been transferred to the Privy Council.

The courts of Probate and Divorce.

In 1857 the jurisdiction over wills, administration and divorces was taken from the ecclesiastical courts and vested in a Court of Probate and a Court of Divorce.

The judicature act.

199. By the judicature act, passed in 1873 and modified in 1875, the courts of Chancery, King's Bench, Exchequer, Common Pleas, Exchequer Chamber, Admiralty, Probate and Divorce,

and the London Court of Bankruptcy were abolished, and in their place was set up the Supreme Court of Judicature, having the powers and jurisdiction of all of them. This court is divided into two parts, namely the High Court of Justice, which is a court of first instance, and the Court of Appeals exercising chiefly an appellate jurisdiction. The High Court is subdivided into divisions, which bear the names of the old courts, such as the Chancery Division or the King's Bench Division. The Common Pleas Division and the Exchequer Division have since been abolished, so that the High Court of Justice now consists of the Chancery, King's Bench and Probate Divisions. These parts and divisions are not however separate courts, but branches of a single Supreme Court. From the Court of Appeals there is still an ultimate appeal to the House of Lords.

The Supreme Court.

The High Court of Justice.

The Court of Appeals.

The Divisional Courts.

The House of Lords.

CHAPTER XI.

THE AMERICAN COURTS.

National and state courts.

200. The American courts are either national or state courts. The former are also called federal courts or United States courts.

The judicial powers of the national government.

The judicial powers of the national government, like its other powers, are limited to such as are granted to it in the constitution, while the state courts have all jurisdiction that is not taken away from them by the constitution. The presumption therefore is against the jurisdiction of a national court and in favor of that of a state court. In this sense all the national courts are sometimes said to be courts of limited jurisdiction; but they are more properly considered as courts of general jurisdiction within the scope of the powers of the national government. The judicial power of the United States, as defined in the constitution,[1] depends either upon the subject matter of the suit or upon the nationality or citizenship of the parties to it.

As to subject matter.

As to subject matter: it extends to all cases at law and in equity arising under the constitution, laws and treaties of the United States, and to all cases of maritime and admiralty jurisdiction. Matters of probate, administration and divorce are excluded. A case is said to arise under the law of the United States when the action is brought directly to enforce or protect a duty or right created by that law or the defendant's defence rests upon a national law. A suit for the infringement of a patent right is of this kind, patents for inventions being granted only by the national government. But if the seller of a patent right sues the buyer for the price, the right violated by the latter's refusal to pay is not the patent right itself but the right created by the contract of sale, which falls under state law, so

[1] Art. III.

that the suit must be brought in a state court. Questions of national law may however arise incidentally in state courts; for instance, if in the last mentioned example the buyer should set up the defence that the patent was void, the state court might have to pass upon its validity, which would depend upon the law of the United States.

As to parties.

As to parties: the judicial power of the national government covers all controversies to which the United States is a party, controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming land by grants from different states, and between a state or the citizens thereof and foreign states, citizens or subjects; also cases affecting ambassadors, other public ministers and consuls. Those provisions would authorize a suit in the national courts by a private person against a state. The bringing of such a suit led to the adoption in 1798 of the eleventh amendment to the constitution forbidding it.

Jurisdiction of the national courts.

201. The Supreme Court of the United States is created and its jurisdiction defined by the constitution itself, and Congress can not by statute restrict its jurisdiction. But the other national courts are creatures of Congress, set up by statute under the general authority given to Congress to establish courts inferior to the Supreme Court, and they have only such jurisdiction as Congress has seen fit to confer upon them. Therefore it is not necessary that the whole field of judicial power marked out in the constitution should in fact be occupied. So far as it is not, the states may occupy it. In fact the jurisdiction given to the national courts by Congress is not quite as extensive as might have been given. That matter was originally regulated by the judiciary act of 1789, which forms the basis of the present law, though it has been since considerably modified.

Exclusive and concurrent jurisdiction.

So far as the jurisdiction of the United States courts depends upon subject matter, that jurisdiction is generally exclusive, the state courts being prohibited from interfering with such cases. But when it depends upon the parties, it is, in most suits between private persons, concurrent with that of

the state courts, the plaintiff being permitted to begin his suit in a national or a state court as he pleases. In the latter case, however, the action may be removed from the state court into a national court if any party desires it.

District Courts.

202. Every state is organized into one or more judicial districts, in each of which is a District Court of the United States, held by a single judge known as a district judge. This is a court of first instance in admiralty, including matters of prize, in bankruptcy and in a few classes of cases at law and in equity; it has also jurisdiction of crimes against the United States.

Circuit Courts.

203. The districts are grouped into nine circuits, and in each circuit a Circuit Court of the United States is held from time to time in every separate district. The Circuit Court has original jurisdiction at law and in equity, and formerly heard appeals from the District Courts. At first the justices of the Supreme Court of the United States were the only judges of the Circuit Courts, each justice having a circuit assigned to him which he visited at least once a year to hold court. But as the business of the national courts increased this was found insufficient, and one or more circuit judges are now appointed in each circuit. At present the ordinary sessions of the court are held by the circuit judge or by one of the district judges, certain matters however being reserved for the full court in which the Supreme Court justice sits with one or two of the other judges.

Circuit Courts of Appeals.

In 1891 a Circuit Court of Appeals, consisting of three judges, was created in each circuit, to which appeals are taken from the Circuit and District Courts.

Supreme Court of the United States.

204. The Supreme Court of the United States sits at Washington, and is composed of the Chief Justice of the United States and eight associate justices. It has original jurisdiction, according to the constitution, in cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party. But its principal business is to hear appeals from the circuits, and in certain cases from the territorial and state courts.

Appeals from state courts.

Generally the state courts are not inferior to the national

courts, and there is no appeal from the former to the latter. But an appeal lies from the highest court of a state in which a decision could be had to the Supreme Court of the United States whenever the state court has decided against the validity of a statute or treaty of the United States or an authority exercised under them, or of any right or authority claimed or exercised under the constitution or a national statute or treaty, or in favor of the validity of any state statute or authority exercised under a state which is questioned on the ground of its being repugnant to the constitution, treaties or laws of the United States. Such a right of appeal is necessary to prevent the state courts from overriding the national constitution and to insure a uniform construction of that instrument. But on questions of state law the decision of the state courts is final and can not be reviewed on an appeal to the Supreme Court.

The Court of Claims.

205. The Court of Claims is a tribunal for passing upon claims of private persons against the United States, because the United States can not be sued in the ordinary courts. It sits at the national capital.

District Attorneys

Marshals.

206. In each judicial district there is a United States district attorney who represents the government in legal proceedings, and a United States marshal, with deputy marshals under him, who corresponds to a sheriff, acts as the executive officer of the national courts, and has the powers of a peace officer within the limits of the jurisdiction of the national government. The general duty of keeping the peace and ordinary police functions belong to the states. Thus if a riot occurs in a state, it must be put down by the state authorities. But if the rioters should interfere with the running of mail trains or with the execution of the mandates of the national courts, the national government might interfere. Also it is the duty of the marshal to arrest persons guilty of crimes against the United States. There are also one or more United States commissioners in each district, who discharge various duties connected with proceedings in the United States courts and act as examining magistrates[2] in criminal cases triable in those courts.

United States Commissioners.

[2] See § 1245.

Courts of the District of Columbia and the territories.

207. The courts of the District of Columbia and the territories are national courts, there being in those places no state governments. They have all the powers and jurisdiction which within the states are exercised by either national or state courts, and in their organization they resemble the latter.

State courts.

208. The judicial organizations of the states vary a good deal in their details and in the names given to the different courts.

Courts of last resort.

Each state has a court of last resort, usually called the Supreme Court or Court of Appeals,[3] which exercises appellate jurisdiction over the other courts of the state.

Highest courts of original jurisdiction.

The highest court of original jurisdiction generally bears the name of the Superior or Supreme Court,[4] and holds terms several times each year in every county in the state. In a few states the sittings *in banc* are held in the state capital only,

Circuits.

and single judges go on circuit to the counties for the trial of cases, like the English judges. This court, like the King's Bench in England, has a supervisory and appellate power over

Courts of equity.

inferior tribunals. Generally it is a court of both law and equity, but a few states have separate equity courts called courts of Chancery.

Inferior courts.

There are also local courts having a limited jurisdiction at law and sometimes in equity, known by various names, such as courts of Common Pleas or County Courts, and City Courts in cities.

Criminal courts.

In some states civil and criminal jurisdiction is exercised by the same courts, while others have separate criminal courts, called by a number of different names.

Probate courts.

The courts which have jurisdiction in probate and administration matters and in the appointment of guardians are usually separate courts bearing various titles, such as Probate Courts, Surrogates' Courts, Orphans' Courts, Prerogative Courts or Ordinary's Courts.

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[3] In some states there are Courts of Appeal which are intermediate appellate courts, not the highest.

[4] A court which is called the Supreme Court of a state may therefore be either the highest court of the state, the ultimate appellate court, or merely the highest court of original jurisdiction, having a Court of Appeals over it.

In a few states there are Courts of Claims for adjudicating upon claims of private persons against the state; in the other states such claims go to the ordinary courts or to the Legislature. Courts of claims.

Justices of the Peace have civil and criminal jurisdiction in petty cases at law. Sometimes they have a very limited equitable jurisdiction. Their courts in some states are courts of record and in others not. Justices of the peace.

Police Courts are petty criminal courts in cities, boroughs and villages. Usually they are not courts of record. Police courts

209. The Senate of the United States and the state Senates act, like the House of Lords in England, as courts of impeachment on prosecutions instituted by the lower houses, but only in cases of misconduct in office on the part of public officers, and the only penalty they can inflict is deposition from office. In a few of the states the Senate formerly constituted a court of appeal, like the English House of Lords, but that plan has been everywhere given up. Courts of Impeachment. The state Senates.

PART SECOND. PRIVATE LAW.

SUBDIVISION I. DEFINITIONS AND GENERAL PRINCIPLES.

CHAPTER XII.

PERSONS.

Definition of person.

210. A person in law means that which is capable of having rights or duties. A natural person is a human being.

Natural and artificial persons.

An artificial, legal or juridical person is something other than a human being which is regarded for legal purposes as having rights or duties, for example a corporation.

Unborn child.

To some extent a child *in ventre sa mere* is treated as a person. He may have an estate limited to him;[1] and it has been held that after his birth he could maintain an action for a personal injury inflicted upon him before birth by the negligence of another by reason of which he was born deformed.

Natural and civil death.

211. A person's natural life ends at his natural death. But at common law if a person was sentenced to perpetual banishment or abjured the realm[2] or entered into religion, that is, become a monk, he was regarded as civilly dead. His property was administered upon and disposed of as though he were dead, and he was incapable of holding property or making contracts. The law however still protected his personal security. Because of the possibility of civil death it became customary whenever in a deed or legal document the term of a person's life was mentioned to specify his natural life. There is now no such thing as civil death.

Presumptions as to life.

A person proved to have been alive at a past time is *prima facie* presumed to be still living, at least for a time within the ordinary limit of human life; but this presumption

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[1] See § 565. [2] See § 1238.

ceases if he has not been heard of for seven years. When two persons perish in the same calamity, as in a shipwreck, and it is not known which died first, the civil law has various presumptions on that point, for instance that in certain cases the elder survived and in certain cases the younger. The common law, if no proof is forthcoming, will assume that both died at the same time, so that neither could be heir to the other. Thus if a man was the owner of property and he and his son were killed in the same battle, it could not be presumed that the younger man lived the longer, so that he inherited his father's property; but the property would descend to the next heir of the father rather than to the heir of the son.

Legitimacy.

212. Persons are of legitimate or illegitimate birth. A legitimate child is one that is either born or begotten in lawful wedlock, that is, at a time when his father and mother are husband and wife. If a child is begotten before his parents' marriage but born afterwards, or begotten while they are married but born after the marriage has been dissolved by death or divorce, he is legitimate. A child not so born or begotton is illegitimate or a bastard. The law presumes strongly in favor of legitimacy. If a married woman bears a child during her marriage or within a competent time thereafter, the law presumes that her husband is the father of the child and that it is legitimate, and will not permit the contrary to be proved except by proof that it was physically impossible that the husband could have been the father or morally certain that he was not. Nor may non-access of the husband to his wife at the time when the child must have been begotton be shown for the purpose of proving the child illegitimate, if he was where he might possibly have had access; nor impotence on his part. By the civil law if the parents of a bastard intermarry after his birth he is thereby legitimated. The common law does not admit this; but in several of the United States the more merciful rule of the civil law has been adopted by statute.

Presumptions as to legitimacy.

Subsequent marriage of parents.

Names.

213. A legitimate child takes the family name or surname of his father, and acquires a christian or given name by reputation. There is no regular way of acquiring a given name; baptism

has no legal effect. A bastard may gain a surname also by reputation. The law recognizes only one given name, what is commonly called a middle name is for legal purposes disregarded; but if two persons have the same surname and christian name, the middle name may be resorted to to distinguish them. A person may bind himself in a contract or any transaction by any name that he chooses to use, whether his true name or not, and may acquire rights by any name. The only consequence of using a wrong name is that it may make it difficult to prove that he is the person intended to be denoted by it. Therefore there seems to be no legal obstacle to a man's changing his name at his pleasure. In most places, however, provision has been made by statute for changing a person's name by the decree of a court, so that the change, being a matter of public record, shall be susceptible of easy proof. So also, although an initial or abbreviation of a name is not properly a name, yet practically it can usually be made to serve as such in a signature. Identity of name is *prima facie* proof of identity of personality. For instance if money is left by a will to John Doe or votes for John Doe are cast at an election, any person named John Doe who appears and claims the money or the office is presumed in the absence of proof to the contrary to be the person meant.

Use of wrong name.

Change of name.

Initials.

Identity of name.

Domicile and residence.

214. A person's domicile is the place where he is living without any intention of departing from it. The requirement as to intention is purely negative; it is not necessary that he should have a positive intention never to change his abode, but merely that he should not have a present intention to change it. Residence is not the same as domicile.[3] A person may have his actual residence in one place and his domicile in another. But a mere temporary sojourn in a place, as of a student at college or a visitor at a watering place, is not a residence. A person may change his domicile at his pleasure; no formal act is required nor any length of residence; as soon as a person takes up his abode in a place without any intention

[3] The words domicile and residence are however often used indiscriminately, so that it is sometimes difficult to decide when either word occurs in a statute which is really meant.

of removing, he acquires a domicile there. The domicile which a person has at his birth is called his domicile of origin. If he afterwards acquires a different domicile and then abandons the latter without gaining a new one, he reverts to his domicile of origin. Settlement is a peculiar species of domicile which a person may have for the purposes of the poor laws.[4] The law in regard to settlement is statutory and is very different from the law of ordinary domicile.

Domicile of origin.

Settlement.

215. Nationality or citizenship is membership in a state of which the person is a citizen or subject and to which he owes allegiance. This does not imply the possession of political rights, such as the right to vote or hold office; women and children are citizens or subjects as much as men. By the common law every person born within the dominions of the Crown of England, or, as it was otherwise expressed, within the allegiance of the King, was an English subject and could not by any act of his own or of any foreign state be divested of his nationality; *nemo potest exuere patriam.* The courts in the United States adopted at first the same rule; but from the first foundation of the government foreigners have been permitted to acquire American citizenship by naturalization,[5] and Congress by statute in 1868 declared the right of expatriation to be a natural and inherent right. Naturalization is also permitted in England. By the law of both countries the child of a citizen or subject born abroad may, if he chooses, claim his father's nationality, provided, under the American law, his father has ever lived in the United States.

Nationality.

In the United States there is a double citizenship, of the nation and of a state. The fourteenth amendment to the constitution declares that all persons born or naturalized in the United States and subject to the jurisdiction thereof[6] are citizens of the United States and of the state where they reside. A person residing in the District of Columbia or in a territory can have only the national citizenship.

Citizenship of the United States and of a state.

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[4] See § 107. [5] See § 1021.

[6] This excludes Indians who retain their tribal governments and the children born in the United States of foreign ambassadors and ministers and of attaches of foreign legations.

Kinship.

216. Two persons are kin or related to each other when one is descended from the other, as in the case of father and son, or both from a common ancestor, as in the case of brothers or cousins. In the former case they are called lineal, in the latter collateral kin. If they are descended from the same pair of common ancestors, they are kindred of the whole blood; if from one only of the pair, kindred of the half blood. Kinship by the half blood exists between the children of one man by different wives or of one woman by different husbands and their descendants. A bastard is considered by the law to be *filius nullius*, and has legally no kindred except his own descendants. Therefore he can not inherit any property from his natural father or mother or any of his natural relatives, or they from him.

The half blood.

Bastards.

Consanguinity and affinity.

Consanguinity is kinship by descent or blood, actual kinship. Affinity is the relationship that exists between a man and his wife's kindred or between a woman and her husband's kindred.

Degrees of kinship.

The degrees of relationship between lineal kin are found by counting the steps of descent from one to the other, each step constituting one degree. Thus a man is related in the first degree to his son and in the second degree to his grandson. For reckoning degrees among collateral kin there are two rules. The common law rule, which is that of the canon law also, is to begin at that one of the parties who is furthest from the common ancestor, or at either party if they are equally remote, and ascend to the ancestor counting each step as one degree. Thus a man is related to his brother in the first degree, the common ancestor being his father from whom they are both equally remote; to his uncle or his first cousin in the second degree, the common ancestor being his grandfather, and he being more remote from the ancestor than his uncle is so that the steps must be counted from him in that case, and equally remote with his cousin, so that the count may be from either; and to his cousin's son in the third degree, the common ancestor being still his grandfather, who is however the great grandfather of the cousin's son, the latter being in this case the more remote from the common ancestor. That is, two persons whose relationship can be traced without going further

Rule of the common and canon law.

up in the line of ascent from either of them than his father or mother are related in the first degree; if it is necessary to go back to a grandfather or grandmother of either of them, they are related in the second degree; if to a great grandparent, in the third degree, and so on. By the civil law rule we begin at either party and count the steps up to the common ancestor and thence down again to the other party. By this method of computation two brothers are related to each other in the second degree, uncle and nephew in the third degree, first cousins in the fourth, and a man and his cousin's son in the fifth.

The civil law rule.

CHAPTER XIII.

THINGS.

Definition of a thing.

217. A thing is any object other than a person in which rights may be had. One person may, it is true, have rights in another, as a husband in his wife or a master in his servant; but persons who thus stand in a position analogous to things are not called things.[1]

Corporeal and incorporeal things.

A corporeal thing is a material object; an incorporeal thing is some ideal immaterial object which for legal purposes is treated as a thing. The most important kind of incorporeal things are certain rights which are regarded as things. It would seem that no distinction could be clearer than that between rights and things. A right is a relation created by law between persons, and need not always concern things at all. If it happens to be a right in or to a thing, the thing is plainly something quite different from the right. Nevertheless a good deal of confusion has prevailed about rights and things both in the civil and in the common law. In the Roman law nearly all private rights, except those which entered into a person's status, such as freedom and citizenship, and those which arose out of his membership in a family, were looked upon as a kind of things capable of being themselves owned and possessed. If for instance Caius had a right to use in any way a piece of land which belonged to Titius,[2] it was considered that that right was itself an incorporeal thing, which Caius owned in just the same manner as Titius owned the land, and of which he might even be considered to have possession. So the right which one party to a contract had against the other by virtue of the contract or the remedial right that arose in a person's favor when another had committed a wrong against him was an incorporeal thing, the subject of ownership. Thus the private

Rights considered as things.

Incorporeal things in the Roman law.

[1] While slavery existed slaves were for some purposes classed as things.
[2] Such a right was called *jus in re aliena*.

law, or at least the substantive law, fell into two divisions, the *jus personarum* and *jus rerum*, as has been explained.[3]

Rights as things in the common law.

The common law has not adopted the Roman theory of incorporeal things in its entirety. In general rights are not regarded as things. There are however a few rights, mostly rights in land, which are classed as incorporeal things, and can stand as the subjects of property rights. These will be described in another place.[4]

Incorporeal things other than rights.

Universitas rerum.

218. There are also incorporeal or immaterial things which do not consist of rights. By the civilians a *universitas rerum*, or group of things, such as a flock of sheep, considered as an entirety and as distinguished from the individual things which compose it, is looked upon as a kind of ideal or immaterial thing; but the common law seems not to make any use of that conception. A telegraphic message, the good will of a business, a trade mark or a trade secret, an invention or discovery and other things of the like nature are often called incorporeal things. But it is doubtful whether this is any thing more than a convenient popular form of expression; whether for technical legal purposes it is really necessary in such cases to posit the existence of a thing at all. Shares of stock in corporations are regarded as incorporeal things.

Telegrams, trade-marks, etc.

Shares of stock.

Funds.

219. A fund is a very important kind of incorporeal thing, which consists of a certain value or purchasing power in a person's hands. It may exist in a distinguishable form, embodied, so to speak, in specific rights or things, or as a purely ideal entity. For example, if a sum of money is given to A in trust to hold and invest it and pay the income to B, this is a fund in A's hands, A may at first receive it in the form of money. If he buys railroad stock with this, the stock represents the fund. If he sells the stock and puts the proceeds into his own business, mingling it with his own money, the fund is thereby reduced to an indistinguishable ideal form. Should he afterwards draw out from his business and set apart for the purposes of the trust an equivalent amount of money and invest it in land or other property, the

[3] See § 50. [4] See § 510.

fund would again become distinguishable. But all the time he is regarded as having been the owner and possessor of the fund, *i.e.* of a certain value or sum of money which he is holding for B's benefit. This is a purely incorporeal thing; it does not consist in the money, the stock or the land, which from time to time represent it and in which it is embodied, but in the value of these.

Specific claims on funds.

But when a fund exists in distinguishable form, any person who has a claim upon the fund has also in equity a claim upon the specific rights or things in which the fund is embodied. And this specific claim often becomes of importance, specially in case of the insolvency of the fundholder. Thus if A holds a fund the value of which is to be paid to B, and becomes bankrupt or insolvent so that his creditors only receive a portion of their debts, then if the fund is not in distinguishable form B is no better off than one of the creditors, he must come in and take his *pro rata* share with the rest. But if the fund is represented by anything that can be identified, such as stocks, bonds or loans on mortgage, B has a right to have that specific property or its proceeds applied to pay his claim in full in preference to the general creditors. Such a claim to specific assets, however, exists only in equity, not at law, and the right to such a preference is a very frequent subject of controversy in the courts of equity. At law a fund, when its existence is recognized at all, is simply a debt, and the person entitled to receive it is an ordinary creditor.

Accessory things.

220. An accessory thing is one which is so attached to or connected with another as to become for legal purposes a part of the principal thing. Thus the wool upon a sheep is accessory to the animal, and if the sheep were sold and nothing said about the wool, the buyer would have it as a matter of course. But a watch chain is not accessory to the watch, though commonly worn with it. Physical attachment is not absolutely necessary to make a thing accessory. The rolling stock of a railroad may be accessory to the road even though temporarily in use upon another road, or the sails of a ship to the vessel though stored for a time in a warehouse on shore. An accessory thing may be detached and cease to

be accessory, as when sheep are sheared or timbers taken out of a building.

221. Land in its legal signification includes not only the surface but extends downward to the center of the earth and upward indefinitely; *cujus est solum, ejus est usque ad coelum.* Therefore it is a violation of the owner's property right to tunnel under his land at any depth, or to occupy the space above it, as by the projecting eaves of a building standing on adjacent land. The owner of land regularly owns all minerals, deposits of oil or natural gas, *etc.* under the surface. But the ownership of these may be separated from that of the soil; a man for instance may sell the mines in his land while retaining the ownership of the soil. Land. Mines etc.

222. Things accessory to land are as follows. Things accessory to land.

1. Things growing upon it. Crops which are planted annually by the industry of man, such as corn or potatoe, and the first year's yield of things which are planted by man and yield a crop the same year, though they continue to yield for several successive years without replanting, such as hops, clover or sugar cane, are called *fructus industriales* or emblements.[5] These while they remain attached to the soil are for some purposes considered as accessory to it; but some person other than the owner of the land may have a right to them. But those things which grow wild upon land or if planted or cultivated by man are not annual crops, such as trees or perennial grasses, except nursery plants and in some cases timber planted and cultivated for sale, are known as *fructus naturales* or *prima vestura*, and are a part of the land for all purposes while they remain attached to it. Emblements. *Prima vestura.*

223. 2. Fixtures. These are things attached to land. This name is sometimes used to include emblements or even *fructus naturales*, but generally not. It does however embrace nursery plants intended to be taken up and sold and sometimes cultivated timber. There is an ambiguity or confusion in the use of the word, owing to a change which has taken place in the law relating to fixtures. It is sometimes used to denote those attachments to the land which have be- Fixtures.

[5] From French *embler* or *emblaver*.

come accessory to it for all purposes, and can not be severed and taken away by any one but the owner of the land, as contrasted with those which, though temporarily accessory and for some purposes going with the land, are yet removable by some person other than the owner and are generally treated as belonging to the person who has the right of removal; and at other times to denote the latter sort in opposition to the former. To avoid that confusion the former may be called permanent and the latter removable fixtures.

Necessary and agricultural fixtures.

In ancient times the only kinds of fixtures that were of much importance were what are known as necessary and agricultural fixtures, that is, those without which the land can not be used at all in the ordinary way for habitation, business or agriculture, such as buildings, fences and walls. These were all permanent fixtures; once attached, they became absolutely a part of the land. Therefore if a man sold and conveyed his land to another, the buildings went with it though not mentioned in the deed; and if a person built a house upon the land of another, even by an innocent mistake supposing it to be his own land, the house belonged to the owner of the land, who in general was not bound to make any compensation to the builder. And such is still the general rule as to that sort of fixtures, though it has been changed to some extent by statute in favor of agricultural tenants and in a few cases the modern law of removable fixtures has encroached somewhat upon the ancient rule, for instance light buildings not set into the ground but simply resting by their weight upon the surface have been treated as removable. But at present fixtures put in for business, ornamental and temporary purposes, such as steam engines, boilers, vats, shelves and counters in stores, sheds, fixed mirrors and many other things, especially those which are intended for purposes of trade and are known as trade fixtures, have been differently treated, and may often be removed by the persons who annexed them or their successors in right. The rules as to when fixtures are removable are somewhat complicated, and it is impossible to reconcile all the authorities. This is owing to the fact that the change in the law has come about gradually and for the most part without a distinct conciousness of the change

Temporary fixtures.

Trade fixtures.

Removability of fixtures.

in the minds of the judges; and the distinction between the two classes of fixtures has often been overlooked. The old law favored permanency, the modern law favors removability. The general principle as to what may be called the new kinds of fixtures is that whether they can be removed depends upon whether or not an intention appears on the part of the person who affixed them to make a permanent addition to the land. And this may in turn depend upon the manner in which they are attached or whether they can be removed without injury to themselves or to that to which they are attached; for instance, machinery can often easily be unscrewed and taken away, but a furnace set in brick and connected with all parts of the house by hot air pipes can not. The purpose for which they were annexed is also important, special favor in the matter of removability being shown to trade fixtures. Removability may also depend upon some agreement between the owner of the land and the party claiming the right to remove, or upon some relation between the parties; thus a mortgage of land generally covers all fixtures, so that the mortgagor can not take them away.

Things placed on land.

3. Things merely placed upon land, such as furniture in houses, machinery in buildings not so attached as to become fixtures or stacks of grain, are not accessory to the land.

Water.

224. 4. Water. The rules as to water will be considered hereafter.[6] The word water or any word denoting a body of water does not include the land under it. If the owner of land on which is a pond grants the pond to another, the grantee does not get the ownership of the bed of the pond but only the use of the water. The technical expression for the bed of a pond or stream is land covered with water.

Close.

225. Every piece of land, whether actually fenced in or not, is conceived by the law as being surrounded by an ideal inclosure, and is therefore denominated a close. Wrongfully entering upon a man's land is called breaking his close.

Messuage.

A messuage means a dwelling house and its curtilage, that is, the land immediately adjoining it and used in connection with it as for a yard or garden.

[6] See Chapt. XXXII.

Chattels.

226. A chattel[7] or chattel personal is any material thing except land, that is, a movable thing or a building or structure on land which is not a fixture. The word is occasionally used to include emblements and removable fixtures. Goods,[8] wares and merchandise mean the same as chattels, except that they do not include money or documents having no intrinsic value, such as bills of exchange or deeds, which are only evidence of rights. Incorporeal things are not chattels.

Goods etc.

Money.

As to money; coins and paper money are chattels. But when one person is bound to pay money to another, the money, unless there is some agreement to the contrary, is usually regarded as a fund and only the value need be paid. Thus if A sends money to his agent to be paid to B, the agent need not pay over to B the identical money which he received from A, but only money to that value. Also by the common law, although the owner of money might have an action against a person who wrongfully took it from him as for taking a chattel, no action of that sort lay for unlawfully detaining or for embezzling it by one who had rightfully got possession of it, but the action in the latter case must be as for a debt, *i.e.* for the value of the money as a fund. If A lost his money and B found it and refused to give it back, B became simply a debtor to A for that sum; A could not sue him to recover the possession of the specific money. The old saying was: "Money has no earmark."[9]

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[7] A Norman-French word of uncertain derivation; perhaps from *catalla*, which in turn may be a corruption of *capitalia*.

[8] In the Roman law *bona* included all kinds of property.

[9] For the present rule see § 883.

CHAPTER XIV.

FACTS.

Actual and constructive facts.

227. An actual fact is one that really exists. A fact is constructive or exists constructively when the law treats a person as if the fact existed whether it really does or not. Thus a person is said to have constructive possession of a thing when the law accords him the same rights as if he had possession, or to be guilty of constructive fraud when the law, for certain purposes, treats him as if he had committed a fraud.

Relevancy.

Evidence.

Legal relevancy.

228. Whenever from the existence of one fact that of another can be inferred, either with certainty or with any degree of probability, the two facts are said to be relevant to each other and the former fact to be evidence of the latter. The weight or strength of the evidence means the degree of probability that the inference has. Thus if a man is found in possession of stolen goods, that is some evidence that he is the thief; if it is immediately after the theft, the evidence is very strong, but after the lapse of a year it would have little weight. Sometimes however the law forbids the inference to be drawn or used for legal purposes. If so, the two facts, though actually relevant, are legally irrelevant or are deemed to be irrelevant to each other, and the one is not evidence of the other. Thus if a man is charged with a crime or a fraud, the fact of his previous bad character is one from which it may logically be inferred that he is guilty. But the law prohibits the inference, rejects that fact as evidence, and will not permit his bad character to be proved against him at the trial. Evidence must be distinguished from proof. Evidence tends to establish a fact, but may be insufficient for that purpose or may be met and rebutted by counter evidence; proof is evidence that is sufficient to actually establish it. For example, if A has been murdered, the fact that B before

Proof.

the murder had expressed hatred against A and an intention to kill him would be strong evidence that B was the murderer, but probably no jury would take that as sufficient proof to convict B if there was no other evidence against him.

Presumptions.

Of fact.

229. A presumption is where one fact is inferred from another. If the inference is drawn according to the rules of logic independently of any rule of law requiring it to be drawn, the presumption is one of fact, *presumptio facti*. In this case the two facts are actually relevant to each other.

Of law.

A presumption of law, *presumptio juris*, is where the law directs the inference to be drawn, whether it is one that would naturally be drawn or not. Presumptions of law are either *prima facie* or conclusive. A *prima facie* presumption is one that the law requires to be made in the absence of proof to the contrary, but the presumption may be rebutted by showing that it is in fact false. Every person for instance is *prima facie* presumed to be of sound mind; but a person may be proved to be insane, if such is the fact. A conclusive presumption of law, *presumptio juris et de jure*, is one that the law will not permit to be rebutted simply by proof that it is contrary to the truth. Some such presumptions are absolutely conclusive and can not be rebutted at all, for instance the presumption that a person intends the legally necessary consequences of his acts;[1] while others are only conditionally conclusive and may be rebutted by proving some specially designated fact that is not merely logically but legally incompatible with the fact presumed. Of the latter sort is in some places the presumption that a person who sells a chattel and continues in possession of it after the sale intends to defraud his creditors, which can not be rebutted simply by proof that his intention was in fact honest, but only by showing some fact which the law regards as a sufficient excuse for retaining possession.

Prima facie presumptions.

Conclusive presumptions.

Fictions.

A legal fiction is where for legal purposes a fact is taken to exist contrary to the truth, for example the assumption that a person who has received by mistake money belonging to another has contracted to pay it over to the

[1] See § 282.

latter.[2] Fictions are used in law, as in other sciences, for purposes of practical convenience, but are never admitted when they will lead to injustice. *In fictione juris semper existit equitas.* In ancient times, when the legislature was reluctant to enact new laws, the courts made use of very bold fictions to introduce needed improvements into the law.[3] But at present this is unnecessary, and the courts would not feel themselves justified in doing so.

Estoppel.

230. A person is said to be estopped when in a legal proceeding he is not permitted to deny the existence of a fact or to set up a claim, although the fact may not in truth exist or the claim may be well founded. Estoppels are of three kinds.

By record. *Res adjudicata.*

(1). Estoppel by record. A matter once determined by the judgment or decree of a court is called *res adjudicata;* and parties to the judgment and their successors in right, who are called privies, can not in any subsequent controversy among themselves dispute it. Thus if A and B have a lawsuit about the ownership of a piece of land, and the court decides that it belongs to B and gives judgment accordingly, that settles the question for ever between them. Neither A nor his heirs nor any person to whom he may attempt to transfer his claim can afterwards assert the land to be his against B, his heirs or any purchaser from him; the court will refuse to listen to such an assertion. But an estoppel does not avail in favor of or against an outsider. A judgment in a suit between A and B that the land belongs to B will not estop C, a stranger to the suit, from claiming it as his against B, nor A from claiming it against C. This is called estoppel by record, because the judgment or decree is preserved in the records of the court and can be proved only by the record,[4] provided the court is a court of record.

Parties and privies only estopped.

But if A should sue B for wrongfully taking his property and B should plead simply "not guilty," and the jury should find a verdict in favor of B and judgment be given for him, the

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[2] See § 375.

[3] For examples of such fictions see § 910, 925.

[4] See § 171.

plea and verdict might be on the ground either that B was the owner of the property and so took it rightfully or that B had in fact not taken it at all. Therefore the record would not create any estoppel as to the ownership; because it would not show that the ownership had been passed upon. Nor could the record be helped out by extraneous proof that the question of ownership was in fact the only one controverted and decided at the trial, the record being the only admissible evidence of what the court did.

Estoppel by deed.

(2). Estoppel by deed.[5] The parties to a deed and their privies are estopped among themselves in any controversy about the matters to which the deed relates to dispute the truth of any statement contained in the deed which is essential to its operation. But if recitals are introduced into a deed by way of explanation concerning facts which are not essential to the operation or validity of the deed, there is no estoppel as to these. Thus it is not necessary in a deed to mention the residences of the parties, though that is often done; therefore if these are incorrectly stated any party is at liberty to prove their incorrectness. If however a deed is wrongly drawn by fraud or mistake, a court of equity will correct or reform the deed,[6] and in a proceeding in equity for that purpose the doctrine of estoppel does not apply.

Reformation of deeds.

Estoppel *in pais.*

(3). Estoppel *in pais.* *In pais* is a designation which is applied to all events or transactions that do not happen or are not done in court. The making of ordinary contracts, taking possession of things, the commission of crimes, marriage, birth and death are matters *in pais.*

An estoppel *in pais* arises where one person by his conduct wilfully leads another to believe in the existence of a fact and to act upon that belief in a way that will be injurious to him if the fact does not exist. The former person and his privies are then estopped as against the latter and his privies to deny that the fact exists. Thus if A sells B's property to C as his own, and B, knowing the property to be his, stands by and witnesses the transaction and makes no objection, and C pays the

[5] A deed is an instrument in writing under seal; see §361.

[6] See §327.

price to A, B can not afterwards claim the property as his and take it back from C. But so long as C has not paid for it, B is not estopped, because C has not yet put himself into a position where he will be injured by B's assertion of his right.

Questions of fact and of law.

231. Questions that come up for decision in court are either questions of fact or questions of law. The former relate to the existence of actual facts: did a certain state of things exist? did a certain event happen? did a person do a certain act? Such questions can not be decided by the application of any rule of law; the very question is, what are the facts to which the rule of law must be applied. A question of law relates to the existence of a presumption of law, a constructive fact or an estoppel or to what a person ought to have done in certain circumstances, and can always be decided by applying to the proven facts an existing rule of law. The question for instance whether a certain man was alive a year ago, is one of fact; but that being answered in the affirmative, whether he must be presumed to be still alive is a question of law. The question whether A knew that his dog, which he has suffered to go at large and which has bitten B, was ferocious and inclined to bite, is a question of fact; but whether, if A did not know, he is responsible for the injury, is one of law. Matters of fact must be proved by evidence, unless admitted by the parties, and are decided by the triers of fact, in the courts of common law by the jury; and the decision does not become a precedent, no rule can be deduced from it which can be applied to decide other questions of fact. But questions of law are decided by the court, that is, by the judge, and no evidence is required for their decision, the court being conclusively presumed to know the entire law. The court may be assisted in coming to a decision by the arguments of counsel; but these are in theory merely for the purpose of calling the attention of the judge to principles with which he is already acquainted but might inadvertently overlook. A decision on a question of law becomes a precedent.

Relevancy and weight of evidence.

Whether one fact is actually relevant to another, whether, that is, it is possible to draw any logical inference at all from the one to the other, though not in its nature capable of

being decided by any rule of law and therefore really a question of fact, is regarded as one of law. The reason is that upon a trial it is necessary to exclude from the consideration of the jury all facts which have no bearing upon the case, in order that the time of the court may not be taken up and the minds of the jury confused with a mass of irrelevant matters. But the decision what evidence to exclude must necessarily be left to the judge, and so practically be treated as one of law. But when the court has decided that a fact is relevant and may properly be laid before the jury as a possible basis for an inference, the strength of the inference to be drawn from it, its probative force, whether it is sufficient, either alone or in connection with other inferences drawn from other *data*, to prove the fact inferable from it, is a question of fact for the jury. This is often expressed by saying that the admissibility of evidence is a question of law, but its weight when admitted a question of fact.

Mixed questions of fact and law.

What is called a mixed question of fact and law is a question that can be separated by analysis into two, one of fact and one of law. For example the question whether A had an intent to defraud B may involve the two quite distinct questions: (1) What was A's actual state of mind? and (2) Did that amount to what the law calls a fraudulent intent?

Importance of the distinction between fact and law.

232. The distinction between questions of law and of fact, or, in other words, between facts which are directly and necessarily followed by certain legal consequences and other facts which are merely evidence of such facts, is of the highest importance and can not be too carefully attended to. Suppose for instance that a person is run over and injured by a railroad train at a highway crossing and sues the railroad company for damages. The liability of the company depends upon whether the injury was caused by its negligence. It is proved that there was no gate or flagman at the crossing. Then the question may be whether the fact of the absence of a gate and flagman was negligence *per se*, or only evidence of negligence to be considered in connection with the other circumstances of the case. Shall the court decide, as matter of law, that the company was negligent because it left the crossing thus unguarded, or shall it leave it

to the jury to say, as a question of fact, whether, taking everything into consideration, the company in its manner of running its train was properly careful or not? If the former, the company is undoubtedly guilty, because there was certainly no gate or flagman; if the latter, the jury may perhaps conclude that notwithstanding that fact the company took in some other manner sufficient precautions against accidents and was not to blame. So if a person makes a false representation to another on which the latter acts to his damage, and a suit is brought for fraud, in which it appears that the maker of the representation had no reasonable ground for believing it to be true but it is not shown by any other evidence that he actually believed it to be false, is the question whether he was guilty of fraud one of law or of fact? Is making a false statement in such circumstances fraud in itself, from which liability must necessarily follow, or is it merely a fact from which the jury may possibly infer that the maker of the representation did not actually believe it, the making of a false representation without any belief being what really amounts to fraud?[7] If the court decides as a question of law one which is really a question of fact, or if it refuses to decide a question of law and permits the jury to pass upon it as one of fact, that is an error for which the judgment may be reversed on appeal and a new trial ordered.

[7] In both of the above cases the question has been decided to be one of fact; unless, in the first case, there is some statute which makes the absence of a gate or flagman negligence or conclusive evidence of negligence.

CHAPTER XV.

ACTS AND THEIR CONSEQUENCES.

Acts.

233. An act[1] includes two elements, a conscious volition and a resulting bodily movement. If A falls or is pushed against B, that is not A's act, it not being volitional on his part. So dying is not an act, not even death by suicide, though in that case it is the consequence of the person's act. Bodily movements due to the mere reflex action of the nervous system, such as instinctively dodging if one is suddenly struck at or walking in one's sleep, are probably not acts. Mere mental states, thoughts and wishes, are not legally acts.[2] Generally the word act denotes not a single volition and bodily movement, but a group of them, such as the act of making a contract or taking possession of a thing.

Acts in the strict and in the wide sense.

An act as above described is an act in the narrower sense, *stricto sensu*, and must be distinguished from the consequences which follow it but are not a part of it. But the word is also used in a wider sense, *latiori sensu*, to include along with the act itself some of its consequences. Thus the three different "acts" of firing a pistol, of shooting a person and of killing a person may all be accomplished by the same bodily movements, but differ from each other by embracing more or fewer of their consequences.

Direct and indirect consequences.

234. Those consequences which are included in the act in the wider sense are called direct consequences; those which are not, indirect. There is no general rule for determining what consequences are direct, and the decisions of the courts exhibit some conflict. Generally when no other act or active

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[1] The word act is sometimes used to include omissions to act. Some writers divide acts into acts of commission and acts of omission. For convenience' sake the word act will sometimes be so used in this book, but never in defining duties or wrongs.

[2] See § 10.

and conspicuous outside agency has intervened, consequences may be regarded as direct so long as the ordinary use of language justifies the including them under the name of the act. We habitually speak of the act of killing a person, where the person's death is reckoned as a part of the act. But if A digs a hole in the highway and B coming along at night falls into it and breaks his leg, his injury is the indirect consequence of A's act. We should not say that A had done any act of throwing B into the hole or of breaking his leg; and B's own act of walking into the hole has intervened between A's act and the injury. Sometimes the same consequences may be treated as direct or indirect as a person pleases. Thus if A drives carelessly in the street and runs over B, B may sue him for a direct injury, for the "act of running over him;" or the suit may be brought for the "act of careless driving," of which the running over B is then regarded as the indirect consequence. The consequences of events other than the acts of human brings are also divided into direct and indirect, direct consequences being those that follow the event immediately or very closely.

Involuntary acts.

235. Bodily movements caused by external force or made without conscious volition are sometimes called involuntary acts. This is incorrect; they are not acts at all. An involuntary act is one that, though volitional, is done under compulsion, that is, the motive to which is fear or duty. There is no general rule for determining what kind and degree of compulsion will render an act involuntary so as to affect the doer's responsibility for it. They are different in different cases. An act that would be considered involuntary for some purposes might be deemed voluntary for other purposes.

Proximate and remote consequences.

236. The consequences of acts as well as of other events are either proximate or remote.[3] These adjectives are also applied to the acts or events themselves, which are said to be the proximate or remote causes of their consequences. The consequences of an act or event form an endless series. It would

[3] The names direct and indirect are sometimes used instead of proximate and remote, and conversely the latter names are sometimes employed instead of the former. But that is incorrect; the two sets of words have quite different meanings.

plainly be unwise and impracticable for the law to attempt to hold a person responsible for every consequence, however distant, which could be traced to his act or to an event for which he was answerable. Therefore after following down the chain of consequences for a certain distance the law stops, refusing to go farther. All ulterior consequences are called remote, and are not recognized for legal purposes as consequences of the act or event at all, but are considered to be due to other causes. Proximate consequences, therefore, of an act or omission are all those which are recognized by the law as consequences of it at all, while remote consequences are those which, though in fact consequences of it, are denied recognition as such and are assumed for legal purposes to be due entirely to other causes.

237. The question of proximateness arises in four classes of cases.

Proximate consequences of conduct in general.

(1). When a person is to be held responsible for the consequences of his own act other than a breach of contract or the non-payment of money. Here the general rule is that those consequences only are proximate which are the natural and probable consequences of his act or were intended by him to follow it. This is a very vague rule, and the courts have had great difficulty in deciding what consequences are to be deemed natural and probable, nor is it possible to make all the decisions harmonize. In an action for wrongfully taking a wagon, the expenditure of time and money by the owner in searching for it before he found out who had taken it was held a proximate consequence of the wrongful act for which he was entitled to compensation. But when a person washed his van in the street, which was forbidden by statute, and the water ran down the gutter and would in ordinary circumstances have passed harmlessly away, but owing to the gutter's being accidentally stopped up it spread over the street, and there froze, so that a horse slipped on the ice and was hurt, it was decided that the injury to the horse was only a remote consequence of the act of washing the van. So an injury caused by the repetition of a slander is not a proximate consequence of its original

publication, the repetition being itself a wrongful act and therefore legally regarded as improbable. However, an intervening wrongful act of a third person will not always make a consequence remote.

Proximate consequences of breach of contract.

238. (2). When a person is to be held responsible for a breach of his contract, other than a contract to pay money. The general rule is said to be that the only proximate consequences are "such as may reasonably have been supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."[4] The making of a contract is a voluntary act on both sides; the parties have it in their power to provide by proper stipulations against the contingency of its not being performed; and if they do not choose to do so, neither one can properly be called upon to answer for any consequence of its breach, however natural or probable, of which he can not reasonably be presumed to have intended at the time to take the risk. In the leading case on this rule the main shaft of a steam mill was broken and was sent by a carrier to an engineer to serve as a model for a new one. The carrier was told that the mill was stopped and the shaft must be forwarded immediately; but in violation of his contract he delayed for some time to send the shaft on, in consequence of which the mill stood idle. It was decided that the loss of the profits which the mill would have made during that time was not a proximate consequence of the carrier's breach of contract, it not appearing that he knew that the want of the shaft was the sole cause of the mill's standing idle.

Loss of profits.

When the contract is for the sale of a thing that can be bought in the market at any time, and the seller fails to deliver it, the buyer can only recover the amount by which the agreed price is less than the market price; because, on the seller's default, he could have gone into the market and supplied himself at the latter price, and it is his own fault if he suffers any farther loss. If the agreed price was higher than the

[4] Or more properly: such as would have been contemplated by the parties had they thought about the matter at all. When persons make a contract they usually expect it to be performed, and often do not advert at the time to the consequences of non-performance.

market price, he has not been damaged at all. He can not claim against the seller any profit which he might have made by reselling the thing at an advanced price, even though before the seller's default occurred he had already made a contract to resell it.

Proximate consequences of the non-payment of money.

239. (3). The proximate consequences of a failure to pay money are only the loss of the money itself and the interest on it; and the principal sum and interest are all that the party entitled to receive the money can recover against the party who ought to have paid it. The creditor can not have compensation for any other damage that he has suffered from being deprived of the money, *e.g.* for the loss of the opportunity to make an advantageous purchase or to engage in a profitable business adventure.

Proximate consequences of events.

240. (4). When a person is to be held responsible for the consequences of an event other than his own act, *e.g.* where an insurance company is bound to pay for a loss caused by fire, the proximate consequences are in general only the direct consequences.

Proximateness for different purposes.

241. A consequence therefore may be proximate for one purpose and remote for another. Thus if an insurance company has agreed to pay for an injury to a ship caused by the perils of the sea but is not to be responsible for one caused by the negligence of the master, and the master negligently sails so close to a dangerous shore that the wind and waves drive the ship on to the shore and break it up, the insurance company is liable for the loss. The direct cause of it was the wind and waves, and the master's negligence was only an indirect and therefore a remote cause. But if the owners of the ship had sued the master for negligently wrecking their vessel, the same loss, being the natural and probable consequence of the master's negligent act and he himself being the person to be held responsible for it, would be deemed proximate.

CHAPTER XVI.

DUTIES AND RIGHTS.

Duties.

242. A duty is the legal condition of a person who is commanded or forbidden by the law to do some act. The act forms the content or subject matter of the duty; to define the duty it is necessary to describe the act. But acts of and for themselves, mere bodily movements, are never either commanded or forbidden; but only because of and in connection with the consequences that will or may follow them. It is the consequences, not the acts, that are really important. Therefore the act that is to form the content of any duty is always described by reference to some of its actual or possible consequences, which may be called the definitional consequences[1] of the act or of the duty. This gives a threefold division of duties, according as the act is defined by reference to its actual, its probable or its intended consequences.

Peremptory duties.

1. Peremptory duties, defined by reference to the actual consequences of the act. The law commands a person so to act or abstain from acting as actually to cause or not to cause certain consequences to ensue. The duty to pay a debt is of this sort. The result to be accomplished is the creditor's possession of the money due him. The debtor must do whatever is necessary to bring that about. If he does not, he has broken his duty. It is not sufficient that he has done his best to pay and has been unable to do so through no fault of his own, or even has been prevented by some inevitable accident. He must pay. So if a person keeps in his possession a dangerous animal, which he knows to be dangerous, such as a bear or a ferocious dog, he is absolutely bound to prevent it, *i.e.* to do whatever acts are necessary to prevent it, from attacking and hurting any other person. It is not enough for him to be careful, even ex-

[1] The expressions, content of a duty and definitional consequences, and the names here given to the three classes of duties are not in common use.

tremely careful. If the animal without any fault of his escapes and bites somebody, the owner has broken his duty.

Duties of reasonableness.

2. Duties of reasonableness, defined by reference to the probable consequences of the act. The law sets some end before the party, and commands him to direct his conduct toward its attainment and use due or reasonable care and diligence to accomplish it. But if he does as much as that and then fails through no fault of his own, he is not guilty of any breach of duty. For example a railroad company must use reasonable care, which in this instance means a very high degree of care, to carry its passengers safety. But it is not bound to insure their safety. If an accident happens on the road and a passenger is injured without any fault of the company, it is not to be held liable. So a person who enters into a partnership is under a duty to use reasonable efforts to make the business of the firm successful and profitable. That is the end to be striven for. But no more than reasonable efforts is required; he is not guilty of any wrong if disaster comes from some cause for which he is not to blame.

Duties of intention.

3. Duties of intention, defined by reference to the intended consequences of the act. A person must or must not act with the intention of producing a certain result; *e.g.* he must not make a false representation to another with an intent to defraud him. In duties of this class the party's actual state of mind is an essential element, as it is not in either of the other two classes. That state of mind is usually called intention; but, as will hereafter be explained, it is not always intention in the proper sense, but may be some other state of mind that is regarded as equivalent in the particular case to intention.

The content of duties.

243. The content of a duty must always be an act to be done or omitted by the person subject to the duty. A person may, it is true, contract for the existence of a fact or the happening of an event other than his own act, as for example that a piece of land which he is selling is not subject to any mortgage or that a third person shall or shall not do a certain act. But that is really an agreement to indemnify the other party to the contract against the consequences of the fact or event, that is, to do an act.

244. Duties to do acts are called affirmative or positive es; duties to refrain from acts, negative duties. Positive and negative duties.

245. Some duties are owed to other persons. How it is wn to whom a duty is owed will be explained hereafter.[2] er duties are owed only to the sovereign and not to private viduals. To whom duties are owed.

The person subject to a duty has been called the person nherence of the duty, and the person to whom it is owed person of incidence. Persons of inherence and incidence.

246. Duties may be divided into general and special. A eral duty is one that rests upon all persons, such as a duty to steal, not to strike or beat another person, not to publish ander about another or not to make a fraudulent misrepntation to another. Such a duty must be a negative one; e is no general duty to do acts for other people's benefit. is a person may stand by and see another's house burn n, and is not bound to do any thing to put out the fire, igh he could do so with little or no trouble. Nor is a on generally under any legal duty to attempt to save another has fallen into the water and is in danger of drowning. pecial duty rests only upon a person who stands in some icular situation, and takes its rise from the facts of the ation, as a duty to perform a contract, to prevent a danger- animal which one has in his possession from doing damage[3] o make a place safe for a person who has been invited to e into it.[4] A special duty may be positive or negative. General and special duties.

247. There is no general rule or principle for determining t acts are commanded or forbidden by law, what duties t. Much effort has been expended in the attempt to find a principle, to discover some general criterion of legal right rong, some general ground of legal liability. But all such ts are fruitless. An act is not always legally wrong because morally flagitious or because it is done negligently or with ntention to injure another; nor is it always permitted by law when it is morally innocent, well intended or not likely ause harm. The law commands or forbids such acts as lawmaker thinks it expedient to command or forbid; and No general criterion of duties.

[2] See §249. [3] See §699. [4] See §696.

the grounds of this expediency may be different in different cases. The various legal duties must be separately learned

248. The word right has four meanings.[5]

Correspondent rights.

1. Correspondent rights. When a duty is owed to a person, he is said to have a right to have the act which forms the content of the duty done or omitted. Thus if A owes money to B, B has a right to have the money paid to him. The content of the right is the same as that of the duty, the person of incidence of the duty is the person of inherence of the right, and conversely the person of inherence of the duty is the same as the person of incidence of the right. In fact the right is the same relation as the duty looked at from the other side. This kind of rights are of no importance for legal purposes, and need not have been mentioned at all were it not that some writers, among them Austin, have regarded this as the only meaning of the word right. Such a right can be violated, but can not in any proper sense be exercised.

Permissive rights.

2. Permissive rights. A person has a right to do or omit an act when the law does not forbid or command him to do it, when he is under no duty as to it. Thus any person has a right to fish in the sea, not because he has any property right in the sea but simply because the law does not forbid him to do so. This kind of rights may be called permissive rights. They are purely negative, have no duties corresponding to them, and are incapable of being violated. They may however be exercised. The content of such a right, like that of the preceding kind, is an act.

Protected rights.

249. 3. Protected rights. The third sort of rights it will be convenient to call protected rights. As has been already explained, the object of the law in imposing duties is to bring about or prevent the happening of certain consequences of the act commanded or forbidden. Those consequences consist in the existence or non-existence of certain states of fact. Thus if A assaults and beats B, B's former bodily condition, which was a state of fact, is destroyed, and a new bodily condition, one of pain and suffering, which is a different state of fact, super-

[5] The names here employed for the different kinds of rights are not in common use.

venes. Or if A owes B a debt, the payment of it will bring about a new state of fact, B's possession of the money. It may be said therefore that the object at which the law aims in creating legal duties is always the protection of states of fact, either by causing an existing state of fact to continue, as in the case just mentioned of B's bodily condition, or by causing the existence of a state of fact, as in the duty to pay a debt. The same state of fact may be impaired or preserved by many different acts, *e.g.* A may inflict a bodily injury upon B by beating him, by negligently managing a railroad train in which B is a passenger, by inviting B into his house and leaving a dangerous hole open in the floor in a dark passage into which B falls, and in many other ways. And on the other hand the same act or omission may affect many states of fact, *e.g.* negligently carrying a light into a powder magazine may cause an explosion that will injure a great many persons and things. Therefore it is more convenient to describe the states of fact and the acts separately. The former make up the content of legal rights, the latter of legal duties. We thus get the conception of legal rights and duties as distinct from each other.

Definition of protected right.

A protected right may be defined as the legal condition of a person for whom the law protects a state of fact by imposing duties upon others. The state of fact, and not any act, is the content of the right, so that to define a specific right it is necessary to describe the protected state of fact. A duty imposed for the protection of a particular right is said to correspond to that right and to be owed to the person who has the right, provided it is enforceable by a proceeding in the name of that person, *e.g.* by a civil suit in which he is plaintiff; but if it is enforceable only in the name of the sovereign, *e.g.* by a criminal prosecution, it is owed only to the sovereign. There is no general rule as to the correspondence between particular rights and particular duties; it must be learned separately in each instance. Some rights have many different duties corresponding to them, and some have few; some duties correspond to many rights, others to few rights or even to a single right. The person who has the right is its person of inherence, and every person who is subject to a corresponding duty is a person of incidence.

The subject or object of the right.

If the state of fact which forms the content of the right includes the possession or the condition of a thing, the right is said to exist in, to or over that thing. The thing is called by some writers the subject and by others the object of the right.

The violation and deprivation of rights.

250. A right of this kind can not be exercised; but it may be violated. Any impairment of the state of fact that forms its content is a violation of the right.[3] There is, however, a difference between violating a right and depriving a person of a right, even wrongfully. If A wrongfully takes possession of B's land or cuts down a tree on it, he violates B's property right in it. But if A by fraud induces B to sell him the land for less than it is worth and to convey it to him, B is unjustly deprived of his property right, he no longer has that right, but there has been no violation of it; there has been no impairment of any condition of the land which the law protects. Another right of B is violated in such a case, as will be hereafter explained, but not his right of property in the land. If A takes possession under his purchase, that is not a violation of B's right, because at that time A, and not B, is the person who has the right.

Breach of duty and violation of right.

The breach of a duty does not always involve any violation of the corresponding right. If the duty is defined by reference to the actual consequences of the act, and those consequences are the same as the facts which form the content of the corresponding right, a breach of the duty can not take place without the right being at the same time violated. This is true of the duty to pay a debt, for instance. The breach of that duty means that the debtor has not done such acts as are necessary to give the creditor the possession of the money, and the being deprived of the money is a violation of the creditor's right because the having the money is the very content of that right. But in many cases the breach of duty and the violation of right may be separated. If a city is bound to repair a highway and neglects to do so, it has broken its duty. But so long

[3] The word violation is usually confined to such impairments of the content of the right as are due to wrongful acts or omissions by others. But in this book it will be used to denote any impairment, so that the violation of a right is not necessarily wrongful.

as no harm to any one's person or property happens from the disrepair no private right is violated. So if A lays poison intending that B's cattle shall eat it, or if A borrows B's watch and negligently omits to take proper precautions to keep it from being lost, he is guilty of a breach of duty. Nevertheless if by good luck the cattle do not eat the poison or the watch is not lost, there is no violation of B's right.

Facultative rights.

251. 4. Facultative rights. There is yet a fourth kind of rights, which consist in a power or authority to dispose of other rights or to do acts so that they shall be legally valid. These may be called facultative rights. Thus if A by his will leaves a piece of land to B to be possessed and enjoyed by B during his life and after his death to go to such of B's children as C shall designate or, as the technical word is, appoint, C has no ownership of the land, no right to possess or use it, nor is its condition protected for his benefit; no one owes him any duties as to it; he has merely a power of appointment over it, to say who shall have it. This power is generally spoken of as a right. So if a number of persons attempt to form themselves into a corporation, they can not do so, their acts will be void, unless the government has conferred upon them a power or franchise to do so. A franchise is a facultative right, often of great value. Rights of this kind may be exercised, but have no duties corresponding to them and can not be violated. Their contents are acts.

Facultative rights are of two classes, namely, such as can be exercised by the mere act of the party himself, without the aid of any court, of which a power of appointment over land is an example, and such as require the assistance of a court to exercise them. Hypothecations, which are rights to have property sold by a court at a judicial sale and the proceeds applied to pay a claim due to the person having the right,[4] are facultative rights of the latter kind.

Rights *in rem* and *in personam*.

252. Rights are further classified as rights *in rem* and *in personam*. These names come from the civil law, and have only lately been introduced into the terminology of the common law. In the civil law they were synonymous with the names

[4] See § 552.

real and personal; but in the common law the words real and personal, which were adopted from the civil law at a very early period, have a different meaning, as will be hereafter explained.[5] These terms are not well chosen to express the distinction which they are used to indicate, and on this account some writers have objected to their use. But there seem to be no convenient and generally accepted substitutes for them.

Rights *in rem*.

253. A right *in rem* is one that avails against persons generally, or, as is commonly said, against the whole world; that is, it can be exercised against any one, or duties corresponding to it rest or may rest upon all other persons. For example ownership is a right *in rem*. If A is the owner of a thing, he may possess and use it against every one, and every one is bound to abstain from intruding upon it. So of the right of personal security; every one is under a duty not to assault another, not to imprison him or not to publish libels or slanders injurious to his reputation.

Duties corresponding to rights *in rem*.

But although when a right *in rem* exists some duties corresponding to it rest upon all persons, it is not true that the duties of all persons to the holder of the right are the same or that they are always negative duties, as certain writers have supposed. If A is the owner for example of a flock of sheep, every other person is under a duty not to take the sheep away from him. That is a general negative duty, and is the same for all persons. But if his neighbor B is the owner of a dog that he knows has a propensity to kill sheep, he comes under a special duty to A, different from the duties of other persons who have no dogs, to keep the dog from killing the sheep, which will generally be a duty to do acts, *e.g.* perhaps to chain the dog up.

Need not be rights in things.

A right *in rem*, notwithstanding the implication contained in the name, need not be a right in or to a thing. It may have nothing to do with any thing. The rights of bodily security, liberty or reputation are rights *in rem*, but they have no things for their subjects. So are some of a man's rights in his wife or child, but the wife or child is not a thing.

Rights *in personam*.

254. A right *in personam* is one that avails only against

[5] See §443.

some specific person or persons, the duties corresponding to which rest upon him or them only. It is a right *in personam certam sive determinatam.* A debt or any right created by contract is of this kind. No one but the debtor is bound to pay the debt, no one but the contracting party to perform the contract; the right is a right against him only, the rest of the world have no concern with it. Trusts also, that is, those rights which are not recognized at common law at all but are recognized and enforced only in courts of equity,[6] are rights *in personam.* Rights of action, which are secondary or remedial rights, exist only *in personam, i.e.* only against the wrong doer. It is obvious that no one can properly be sued for a wrong except the person who committed it or some person who has succeeded to his position.

Obligations.

In the civil law rights *in personam* and their corresponding duties were called obligations, that word being used to denote the right as well as the duty. The meaning of the word obligation in the old common law was different[7]; but at present it is often employed in the civil law sense, as will be done in this book. The person subject to the duty, who is bound by the obligation, is called the obligor, and the party having the right, to whom the duty is owed, the obligee. The words debtor and creditor are sometimes used in a general sense as equivalent to obligor and obligee, but strictly they are confined to cases where the obligation is to pay money.

Obligations *ex contractu* and *ex delicto.*

The Roman lawyers divided obligations into such as arose from contracts, *obligationes ex contractu,* and such as arose from delicts or wrongs, *obligationes ex delicto,* the former being primary and the latter secondary rights and duties. Afterwards two other classes were added, namely, obligations *quasi ex contractu,* which were primary obligations resembling contract obligations but arising from transactions which were not strictly contracts, as for instance where one person rendered valuable services to another without the latter's request but the latter was held bound on grounds of justice and equity to pay for them, and obligations *quasi ex delicto,* which were secondary obligations, like obligations *ex delicto,* but arose from certain acts

[6] See § 38. [7] See § 376.

which, though in some respect wrongful, were not technically classed as delicts. The names *ex contractu* and *ex delicto*, however, are often used to include those obligations which are only *quasi ex contractu* or *ex delicto*.

Chose in action.

255. The common law name for a right *in personam* is *chose* in action. This however does not mean that such rights are regarded as incorporeal things; at least they are not now so regarded, if they ever were. Nor is it the case that every right which needs to be enforced by an action is a *chose* in action. An action will sometimes lie not technically for a wrong, but to specifically enforce a primary right, which may be a right *in rem*. If A wrongfully takes possession of a chattel which belongs to B, B may be obliged to resort to an action to regain the possession. Nevertheless his right in the chattel is not a mere *chose* in action, a right *in personam* against the taker, but is ownership, a right *in rem*.[8] B in such a case has his choice between two actions: he may sue to recover the possession of the chattel itself, which action is for the direct and specific enforcement of his primary right of ownership; or he may sue for money damages for the wrong done him by the unlawful taking, which action is based upon a remedial right, a right *in personam* against A, which latter right is a *chose* in action.

Writings as *choses* in action.

When a right *in personam* is created by a written instrument, *e.g.* a bond or a promissory note, the writing itself, as well as the right created by it, is sometimes called a *chose* in action.[9]

Rights *in re* and *ad rem*.

256. A right *in re* means a property right; and a right *ad rem*, a right to acquire a property right, *jus ad jus in re acquirendum*. Thus if A is the owner of a piece of land, he has *jus in re* in the land. If he contracts to sell it to B, the land does not become B's, B does not acquire *jus in re*, till A has made a deed of it in due form; but in the mean time B has *jus ad rem*, a right to the land.

Perfect and imperfect rights and duties.

257. Rights and duties are perfect or imperfect. A perfect

[8] Blackstone however calls it a *chose* in action. 2 Black. Com. 452.

[9] In the civil law the word obligation came to be used in the same way. See also § 376.

right or duty is one that can be enforced by an action or legal proceeding brought for that purpose by the holder of the right; an imperfect right or duty is one that can not be enforced in that manner, but which may usually to some extent be enforced in other ways. If there is no way whatever of enforcing it, it does not exist as a legal right or duty. *Ubi jus, ibi remedium.* For example, after six years a debt usually become "outlawed," and the creditor can not sue the debtor for it. It does not, however, become entirely extinct, but is merely reduced to the condition of an imperfect obligation, and certain legal effects may still result from its existence.[10] So a person is under no perfect duty to use any care for the safety of himself or his belongings; if he injures himself by his own negligence, no one can sue him for that injury. But when a person is refused a remedy for an injury which he has suffered from another's negligence because he has by his own want of care contributed to the injury, it may be said that he was under an imperfect duty to take care for his own safety.[11]

Several rights and duties.

258. Rights are several, common, or joint, and duties are several or joint. A right or duty is several when the person of inherence is a single person, which is the ordinary case. It is joint when the same right or duty belongs at the same time to two or more persons. If A and B make a joint promissory note or bond to C, jointly agreeing to pay him money, the duty is joint; or if A makes his promissory note or bond to B and C jointly, agreeing to pay them money, the right is joint. A duty may be at the same time either joint or several at the option of the person to whom it is owed. For instance A and B may bind themselves jointly and severally to C to pay money, so that if the money is not forthcoming C may at his option sue A and B for it jointly in a single action or he may sue either or both of them separately. If two persons own a thing jointly, each of them does not own one half of it, but the single right, of which both are holders, extends over the whole thing and every part of it.

Joint rights and duties.

Common rights are where two or more persons have

Common rights.

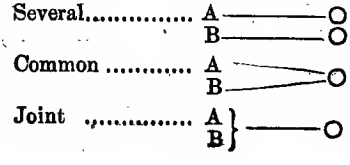
[10] See § 888. [11] See § 891.

at the same time separate rights in undivided parts of the same thing. If A gives half of a piece of land to B, not specifying which half, and afterwards gives the other half to C, B and C are owners in common; but if he gives the whole land to B for his life and after his death to C, although by the gift C obtains a present right in the land, so that he can in some cases bring an action for an injury to it, B and C are not owners in common; their rights exist at the same time, but each is a right in the whole of the land. In the case of common rights the rights are separate and distinct, just as much as if they were rights in separate things; each right extends over only a part of the thing, but so long as no physical division of the thing has been made it is impossible to say which part.[12]

The unity of joint rights.

259. Joint rights, and analogous statements may be made as to duties, are said to have a four fold unity, namely, of interest, of time, of title and of possession; which is only a technical manner of saying that the holders do not have distinct rights but the same identical right. Therefore their interests must be the same; one can not have a right which will endure for a longer time than the others, or have a more extensive right of enjoyment than the other, or hold his right subject to a condition which does not affect the right of the other. The rights of all, too, must begin at the same time; if one holder acquires his interest before the other, there is no joint right but only common rights, as in the case above mentioned of A giving half of a piece of land to B and afterwards the other half to C. The parties must also acquire their right by the same title or

[12] The difference between two several rights and common or joint rights of two persons in a thing may be illustrated by the following diagram, in which the letters represent the persons, the straight lines the rights and the circles the things. In several rights there are two persons, two rights and two things; in common rights, two persons, two rights and one thing; in joint rights, two persons, one right and one thing.



transaction. If the owner of a piece of land gives one undivided half of it by his will to B and the other half descends to C as his heir, although B and C have equal rights and both acquire them at the same time, namely, the instant of A's death, yet they are owners in common and not joint owners. Unity of possession simply means that the right of each extends to all parts of the subject of the right, not, as in common rights, to an undivided part of it. In the case of two holders they are said in the old books to hold *per my et per tout*, by the half and by all. If the four fold unity of the right is in any way destroyed, its joint character ceases. Thus if one joint owner of a thing sells and transfers his right, the buyer does not become a joint owner with the others but an owner in common with them, although they continue to be joint owners among themselves of the part which remains to them.

Survivorship.

From this unity also proceeds a most important characteristic of joint rights and duties, namely, the right of survivorship, or *jus accrescendi;* which means that if one joint holder dies his interest does not descend to his heirs or go to his executor or administrator, but accrues to the other joint holders.[13] That is, if A, B and C are joint holders of a right, each of course having a one third interest, and A dies, B and C continue to hold the entire right, each now having a half interest, and if B then dies, C becomes holder in severalty of the whole. The same rule applies at law to joint duties. If A and B are jointly indebted to C, and A dies, B must pay the entire debt and A's estate is exonerated. But a court of equity will compel A's estate to contribute. At present however survivorship as to rights of property has in most cases been abolished in the United States.

Common rights have no unity.

Common rights, being distinct and separate rights, have not the unity of joint rights. The interests of the holders may be different, one may have larger rights than the others or the rights of one may be absolute and those of the others conditional, they may begin at different times, and be acquired in different ways, and there is no unity of possession. Two holders are said to hold *per my* but not *per tout*. Also there is no right of survivorship.

[13] As to partnership property, see §860.

Preference of joint rights.

The law prefers joint to common rights; and therefore if a right is given to two or more persons at the same time and by the same transaction, and it does not appear that their rights are to be unequal, the law will presume that their interests are equal, and that a joint right rather than common rights was intended. So a joint duty is preferred to a joint and several one. If two persons by a concurrent act assume a duty, *e.g.* if A and B make a contract with C, and the duty might be joint, it will not usually be held to be joint and several unless an intention to make it so is expressly declared.

Conditions.

260. A duty or right may be absolute or subject to a condition. Conditions are either precedent or subsequent.

Conditions precedent.

A condition precedent is one that must be performed before the right can begin, the duty become performable or some transaction affecting the right or duty take effect. If A agrees to build a house for B on such a piece of land as B shall choose, he is not bound to build until B has designated the place. The designation of the place by B is a condition precedent. So if a father by his will leaves property to trustees to pay the income to his daughter until she marries and then to convey the property to her, her marriage is a condition precedent to her right to the property. When two persons are bound to do acts for each other and the acts are to be done at the same time, so that the performance by each is a condition for that of the other, the conditions are said to be concurrent. Thus if A agrees to sell his horse to B and deliver him at a certain time, and B agrees to pay the price on delivery, the delivery and the payment are concurrent conditions. A need not deliver unless B pays, nor B pay unless A delivers. A concurrent condition is a species of condition precedent.

Concurrent conditions.

Conditions subsequent.

261. A condition subsequent is one on the happening of which a right or duty which has already begun will be forfeited or come to an end at the option of some one who is entitled to enforce the condition. Thus if land is left by will to a widow on condition that she never marries, the condition is subsequent. She takes the property at once, and if in fact she never marries, the condition never has any effect. But if she does marry, she breaks the condition, and the heir of the testator

enter upon the land, put an end to her right, and deprive of the estate. City lots are frequently conveyed by deed ect to conditions subsequent that certain offensive trades l not be carried on upon them, intoxicating liquor sold e or other acts done calculated to make the neighborhood leasant. However the breach of a condition subsequent Breach of conditions.
ır of itself puts an end to the right to which it is attached, merely gives to some person the power to put an end to it e pleases. Thus in the case above mentioned of land given widow on condition of her never marrying, if she does ry she will nevertheless not lose her estate unless the of the testator chooses to enforce the condition. A right ake advantage of the breach of a condition subsequent and nforce the forfeiture is a facultative right, and if not exer- l may be lost by lapse of time. But even before a suffi- t time for that purpose has elapsed, the party entitled to Waiver of breach of condition.
advantage of the breach may waive or relinquish his t to do so. In general no formal act is required for waiver[1] of the breach of a condition, any conduct cing an intention not to enforce it or amounting to an owledgement of the right as still existing will be suffi- t as a waiver. Thus if a tenant of land has broken a ition in his lease and the landlord afterwards, with know- e of the breach, accepts rent from him accruing after the ch, the condition is waived. But any act done in ignorance ne doer's rights is not a waiver, as if a landlord receives from his tenant not knowing that the condition has been en. By the common law if a breach of a condition has been waived no subsequent breach of it can ever be en- d, but the condition is gone forever; *e.g.* if the landlord knowingly receives rent after breach of a condition by the nt, the tenant may afterwards break it as much as he pleases the landlord can not expel him for so doing. Such is still general rule, but subject to some exceptions. When a condi- Performance of conditions.
subsequent has been fully performed it ceases to exist, and

[1] The termination "er" is commonly used in legal nomenclature to form l nouns where "ing" is used in ordinary English; *e.g.* "waiver," " for "waiving," "using."

the right becomes absolute as though there had never been any condition. Thus if land is granted to a man on condition that he builds a house of a certain value upon it within ten years, if he builds the house the condition is performed and his right in the land is absolute. But a condition that a woman shall not marry can never be fully performed so long as she lives, so that her right can never be absolute. If however she dies unmarried and the estate descends to her heir, his right will be absolute.

Forfeiture by breach of condition.

262. If a condition subsequent is once broken, the right to which it is attached is forfeited at law; and the holder of the right can not by any means avoid the effect of his breach, even if it was purely accidental on his part, and retain his right, if the other party chooses to enforce the forfeiture. But

Relief in equity against forfeitures.

a court of equity, when it can be done without injustice, will relieve against the forfeiture, permit the holder of the right, upon making compensation for any damage that he may have caused the other party, to perform his condition notwithstanding his previous default, and forbid the other party to enforce the forfeiture. This will usually be done when the breach of the condition was unintentional, or due to accident or mistake, or consisted merely in not doing an act by a certain time if the act can still be done and no injury except what can be compensated for by the payment of money will ensue from the delay. Time is then said not to be of the essence of the transaction, and equity will allow a reasonable extension of time. Thus if land were conveyed to a man on a condition that he should build a house on it by a certain time, and for any reason he was prevented from getting the house done by the time appointed, a court of equity would not in ordinary circumstances allow his estate in the land to be forfeited by the delay. But some conditions can not be relieved against, *e.g.* a condition that a woman shall not marry again; and even time may in some cases be essential, if for instance the act is of such a nature that it can not be effectually done after the time appointed or it would be unjust to the other party to compel him to accept a delayed performance.

Foreclosure of conditions.

When a condition subsequent has been broken and the circumstances are such that a court of equity will relieve

ainst the forfeiture and permit the party guilty of the breach redeem and save his right by performance, the party entitled take advantage of the condition may foreclose it, that is, may apply to the court to fix a time within which the con- ion must be performed, and if within the time fixed by the rt the other party does not perform and pay any damages t may be imposed upon him for his default, his right to e his interest by performance will be foreclosed or cut off.[15]

Express conditions.

263. A condition may be express or implied. It is ex- ss if it is mentioned in the agreement or transaction by ich the right is created, as in case of the condition above ntioned that a widow shall not remarry or that intoxicating uor shall not be sold upon land. Express conditions arise n the will of the parties who create or transfer the right.

Implied conditions.

But sometimes the law attaches conditions to rights inde- dently of the will of the parties, and even in opposition to "As if a grant be made to a man of an office, generally, hout adding other words; the law tacitly annexes thereto a et condition, that the grantee shall duly execute the office, breach of which" he may be removed from office. The ie is true of the franchises of a corporation. A corporation y forfeit its special rights, or even its corporate existence, by nser of its franchises or sometimes by mere non-user.

Impossible and illegal conditions.

264. If a condition precedent is impossible of performance ecomes impossible before the time comes for performance, he act to be done is illegal, the condition nevertheless has full effect, and the right which depends upon it will never e. But it is otherwise with a condition subsequent, where right has already begun to exist before the time comes for orming the condition. If the condition is or becomes im- ible or illegal, or if it is repugnant to the nature of the t, as a condition annexed to a property right that it shall be transferred, performance is excused, the condition is void, the right is absolute. But impossibility means natural hysical impossibility, not mere inability on the part of the y to perform it. If land is given to a man on a condition he pays a sum of money, and he can not raise the money,

[15] See § 548.

or that he marries a certain woman, and she refuses to marry him, the condition is valid and binding; but if the woman should die, the condition would still be valid if it were a condition precedent, and the grantee could never take the land, but would become void if it were a condition subsequent, and the grantee could keep the land.

Limitation.

265. A right may be so constituted as to come to an end of itself, without the act of any one intervening to put an end to it, upon the happening of an event. This is called a limitation. Thus property may be given or limited to a person for his life only, his right ceasing at his death and not descending to his heirs, or it may be given for a fixed term, for instance ten years, so that it will cease by mere lapse of time. If the event is contingent, that is, one that may never happen, the limitation is called a conditional limitation, or sometimes a condition in law, as distinguished from a true condition or condition in deed. This closely resembles a condition subsequent, but differs from it in being self acting. It is often very difficult to determine whether a condition subsequent or a conditional limitation is intended. It usually depends upon the words of the instrument or transaction by which the right is created. Such words as "so long as," "while," or "until" usually import a limitation, while "if," "provided," "on condition," "so that" and the like are more appropriate for a condition. Thus a gift to a widow by her husband's will "provided she does not marry again" would usually be held to be on a condition, but a gift to her "while she remains unmarried" or "until she marries again" would be on a conditional limitation.

Conditional limitation.

Succession.

266. Many rights are capable of being transferred from one person to another, and sometimes duties are transferable, though less commonly than rights. The transfer of a right or duty is called in general succession. Successions are either at death, as where a man dies and his land descends to his heir, or *inter vivos*, as in sales and gifts. They are also divided into universal and singular. A universal succession is where all of a person's rights and duties, or all which are capable of transfer, are transferred altogether in a lump, so that the successor simply steps into the entire legal position of the person to whom he

At death and *inter vivos*.

Universal succession.

ceeds. In the Roman law the *heres*, or heir, succeeded in
s way to his ancestor; his ancestor's rights became his rights
l he assumed all his ancestor's duties, so that a son might
compelled to pay his father's debts even though his father
l left him no property with which to pay them. The to- *Universitas juris.*
ty of a person's rights and duties capable of passing to
ther person by universal succession was called in that law
niversitas juris, and when it went to an heir it was called
iereditas. In the common law there is no true universal
cession; but an executor or administrator of a deceased
son[16] or the assignee of a bankrupt[17] may be regarded as a
d of qualified universal successor.

Universal succession implies more than the mere transfer Transfer of personality.
rights and duties. It implies the transfer of personality, or
it was called in the Roman law *persona*. The successor is
ked upon, so far as concerns the rights and duties trans-
red, as being the same person as him to whom he succeeds,
l therefore is bound by the acts and declarations of his
decessor as if they were his own acts and declarations. If
executor for instance sues to recover a debt due to the
eased person, any statement which the decedent made in his
time going to show that the debt is not really due or any
of the decedent having the effect to discharge the debt
y be proved against the executor as it could against the
edent himself if he were the plaintiff. But in the common Separation of personalities.
the new personality which the successor thus takes is kept
ite distinct from his own individual personality. He is re-
ded as having at the same time two distinct and separate
sonalities, his own and that of the person to whom he has
ceeded, united in himself. In his individual capacity he is
ally a different person from himself in his capacity of successor;
l generally neither personality is affected by the acts, bound by
duties or capable of enjoying the rights of the other. If the
cessor is bound to pay the debts of the person to whom he has
ceeded, he need only pay them out of such property as he has
ived from the latter, not out of his own property; nor is he
cted in his individual capacity by any acts or declarations

[16] See § 662. [17] See § 680.

of the latter. It is even possible for him to be legally considered as having knowledge of a fact in one capacity and being ignorant of the same fact in the other capacity.

Singular succession.

Singular succession is the transfer of a single right or duty or a specific group of them, as in the case of an ordinary sale or gift. It does not now involve any notion of the transfer of personality; but it seems that originally it did, men in ancient times having apparently been unable to conceive of a right or duty being detached from the person in whom it originally inhered, and so having been driven to the conception of a transfer of a part of his personality whenever a right was transferred, which to us in modern times seems the more strange and difficult conception of the two. The old idea is so far retained at present that even a singular successor, as to the particular duty or right tranferred to him, is generally bound, like a universal successor, by the acts and declarations of his predecessor.

Privity.

267. The relation between two successive holders of the same right or duty is called privity, and the successor is called the privy of his predecessor in title. Privity also exists between the joint holders of a right or a duty; and the expression privity of contract is applied to the relation between the parties to an agreement, though here the word is used in a somewhat different sense.

The transfer and the extinction of rights.

268. The distinction must be noted between the transfer of a right, where the successor takes the same right that his predecessor had and there is privity between them, and the extinction of a right with the creation of a new one in its place, in which case there is no privity between the holder of the old and of the new right. If the owner of land sells and conveys it to another, the buyer takes the same right that the seller had; if the right was subject to conditions, exceptions or burdens of any kind in the seller's hands, it is equally so in the buyer's. The same is true of sales and gifts generally and of the acquisition of property by descent or by will. But if one person wrongfully takes possession of another's land claiming it as his own, which is called adverse possession, and remains in possession for a certain time, usually twenty years, he becomes the owner of the land. Here the adverse possessor does not acquire the

right which the former owner had, but a new and independent right, the former right having been simply extinguished. So if A throws away and abandons a chattel of his and B picks it up and appropriates it, B does not get A's old right but a new ownership.

269. Assignment is a general name for the transfer of a right by agreement *inter vivos* when the entire right is transferred. A gift or sale is an assignment, but a loan is not, because the lender transfers only a part of his right remaining still the owner of the thing lent. Sometimes however a court may authorize a person to make an assignment of a right belonging to another, as when property is sold by the sheriff under an execution against the owner; and the expression assignment by operation of law is occasionally used to denote certain transfers of rights which take place without the act of the holder or even against his will. A written instrument by which an assignment is effected is also called an assignment. In its legal sense assignment means the transfer of a right rather than of a thing. If the possession of a thing is also transferred, that, for legal purposes, is a mere incident or mean to the transfer of some right in the thing. Alienation and conveyance have nearly the same meaning as assignment, but in strict technical use are confined to transfers of real property, and are sometimes employed in cases where the transferrer tranfers less than his entire right. Thus if A is the absolute owner of land and gives it to B for his life only, the gift, as well as the written instrument by which it is effected, is called a conveyance or alienation, but not an assignment.

Assignment.

Alienation and conveyance.

An assignment in the proper sense, which is often called by way of distinction a legal assignment, is an actual transfer of an existing right from the assignor to the assignee.[18] No new right is created by the transaction. But besides this there is what is called an equitable assignment or an assignment in equity, which is not in the proper sense an assignment at all.

Legal assignment.

Equitable assignment.

[18] The terminations "or" and "ee" are much used in law to denote respectively the doer of an act and the person to or for whom it is done, *e.g.* assignor and assignee, grantor and grantee, donor and donee.

In an equitable assignment the so-called assignor does not really transfer the right supposed to be assigned to the so-called assignee. He retains it himself, and simply agrees with the assignee to hold it for his benefit, to permit the assignee to exercise it as if it had been transferred to him, to give the assignee the advantage of it, and sometimes to transfer it to the assignee at some future time. He holds it in trust for the assignee. Thus if B has a debt due him from A and makes an equitable assignment of it to C, B remains the creditor as before, A still owes the money to B and not to C, and a suit to recover the money must be in B's name; B's right has not been transferred to C. But if B receives the money from A he must pay it over at once to C, and B must permit C to receive the money from A and even permit C to sue A for it in his name. Thus C, though not legally the creditor, stands practically in nearly the same position of advantage as if he were; he has all the benefit of being creditor without actually being such. An equitable assignment therefore is not a transfer of an existing right, but the creation of a new right in the so-called assignee against the so-called assignor, and a new duty in the latter to the former. This new right and duty are purely equitable, enforceable only in the courts of equity. It must be observed, however, that whether an assignment is called legal or equitable does not depend upon the nature of the right assigned but upon the nature of the transaction itself which is called an assignment. If the right is actually transferred, the assignment is a legal assignment, and a purely equitable right may be transferred as well as a legal one; and on the other hand, even though the right be a legal one, if it is not actually transferred but only a new right and duty created as to it, the assignment is only an equitable one Thus in the illustration above given A's debt to B is a legal right, enforceable at law, but B makes an equitable assignment of it to C. Then C, having got by that transaction a new purely equitable right against B, might if he chose actually tranfer it to D, *i.e.* make a legal assignment of it to D.

Difference between legal and equitable assignment.

Assignment of *choses* in action.

270. At common law *choses* in action were not assignable; a debt, for instance, could not be transferred to another person

to enable the transferee to sue on it at law in his own
. But choses in action were assignable in equity. This
t: (1) that the common law rule of non-transferability
ot apply to purely equitable antecedent rights at all, trusts
g always been transferable; and (2) that an equitable
ıment could be made even of a legal chose in action.
esent, however, by statute legal choses in action, if they
primary rights, have been made assignable. Remedial Assignment of rights of action.
s, rights of action for wrongs, are sometimes assignable
sometimes not. Generally rights of action for breaches
ntract and for those wrongs by which the wrongdoer is
tly enriched, such as the wrongful taking or detention of
rty, may be assigned, but not rights of action for purely
nal injuries, such as assaults or slanders. An assignment, Notice to the debtor.
r legal or equitable, of a chose in action has to be perfected
ving notice of it to the debtor or obligor. If without
notice the latter goes on and performs his obligation
ıe original creditor or obligee, he will be excused from
rmance to the assignee. Thus if A is indebted to B,
B assigns the debt to C, notice of the assignment must
ven to A, otherwise he may pay the debt to B and be
arged, or B may assign it again to another person and
ssignee who first gives notice to A will have priority.

271. The assignment of a *chose* in action is said to be Assignment subject to equities.
ct to equities, or the assignee is said to take the right
ned subject to equities. Equities here does not mean simply
able rights, but claims of any kind, legal or equitable,
or against the right assigned. These equities are either
ies in favor of the original obligor or of third persons.
former exist where the obligor himself has some defence or
ıe for non-performance in whole or in part against the original
ee who makes the assignment; for instance if A owes B a
of $1000 which B assigns to C, the fact that B had practiced
ud upon A to induce him to contract the debt, so that
ould have a right to rescind the contract and refuse to pay
ebt because of the fraud, creates an equity in A's favor; so
the fact that B owes A $600 on another account, so that

if B should sue A for the $1000, A could set off or deduct the $600, and B would recover only the balance of $400. But if before the assignment to C, B was holding the debt in trust for D, that would be an equity in favor of D, a third person. An equity attaching to the *chose* in action is one that relates directly to it, such as A's right to rescind a contract for fraud or D's claim in the foregoing example, while a collateral equity is one that has of itself no connection with the *chose* in action, like A's right to set off his debt against B's.

The rule that an assignment is subject to equities means that such equities avail against the assignee as well as against the assignor; the assignment does not deprive the obligor of any defence or set off that he would otherwise have had against the original obligee or affect any third person's rights or claims. Thus in the examples given above A or D could enforce his claims against C just as he could against B. But in some places the assignment is not subject to collateral equities in favor of third persons.

Assignments free from equities.

Assignments of rights *in rem* are not subject to equities at law; nor are they in equity, if the assignee takes the right in good faith for a valuable consideration. Thus if A sells and conveys his land to B without receiving the price, and B contracts with A that he will give A a mortgage on it for the price, and B resells and conveys the land to C without having given the mortgage, C can hold the land free from all claims of A at law. And even a court of equity will not enforce A's claim against C, if C had no notice of it when he bought the land. But if C took the land from B as a mere gift, without any consideration, or if he knew of A's claim when he bought, equity will enforce A's rights, and compel C to give the mortgage.

Lis pendens.

If however a person takes a right from another against whom a suit is pending to contest his claim to it, which is called a *lis pendens*, he takes it subject to the event of the suit. Thus if A is in possession of land and B brings an action to recover the land from A, claiming it as his own, and A pending the suit sells and conveys the land to C, and judgment is afterwards given against A in the action, C is bound by that judgment and B is not obliged

ing another action against C to try his right. Otherwise fendent could always defeat such a suit by a transfer of roperty, and there would be no end to litigation. But in places, by statute, a purchaser of land for value is not d by a *lis pendens* of which he has no notice unless a ication of it is recorded in the public land records.

Dispositive facts.

272. Every right or duty is conditional upon the exist- of certain facts, is a legal result of their existence. facts on the existence of which a duty or right is ed, transferred or extinguished are its dispositive facts. the making a contract is a dispositive fact of a which is created by it, and payment a dispositive fact hich the debt is extinguished; or taking possession of a which belongs to no one is a dispositive fact of the right roperty in it which the taker thus acquires. A fact may egatively dispositive, its effect being to prevent the other sitive facts from having any operation. Thus in a contract, act agreed to be done is unlawful, the contract is void, ight or duty is created. The facts that make the act un- al are negatively dispositive.

Title.

273. The immediate fact or event by which a right or is acquired, either by being newly created or by being trans- d to the acquirer from some previous holder, is called the title e right or duty. This word title has two principal mean-

First, it means, as just stated, the immediate dispositive by which a right is acquired, in which sense we speak of by descent, by purchase, by contract, and by many other s. Secondly, the word title is often used to denote a rty right itself, in which sense we say that the title to a in piece of land is in a certain person, meaning the owner- of the land.

Titulus and *modus acquirendi.*

The word corresponding to title in the Roman law is *us.* When the title to a right can be divided into two , an agreement and some subsequent act or event necessary rry the agreement into effect, the agreement is called by civilians *titulus* and the subsequent act or event *modus irendi.* Thus in the Roman law a mere agreement to sell uy a thing did not make the buyer the owner of it; it

was necessary that the thing be delivered in performance of the contract. The agreement was *titulus*, and the delivery *modus acquirendi*. Some writers on the civil law have tried to analyse all titles into those two parts; but the result of their attempts has mainly been a number of profitless subtilties. These terms are not much used in the common law; but the distinction which they mark is sometimes of importance, and when it is, they may be conveniently employed.

Incomplete rights and duties.

274. The dispositive facts of a right or duty need not all come into existence at the same time. To enable a man in most cases to make a contract he must be of full age. That is one of the dispositive facts of nearly every contract right or duty which he acquires. After his majority he may do the juristic act of making a contract, and that contract may contain a condition precedent, the performance of which at some future time completes the tale of dispositive facts of the contract obligation. When some of the dispositive facts of a right or duty have come to exist but others are still lacking, various legal states arise which are not exactly rights or duties but yet are analogous to them.

Capacities.

The first of these is a capacity to have a right or duty or to do a juristic act. An illegitimate child has no capacity to inherit property from his father; a married woman, at common law, to own chattels or to make a contract. A capacity arises from the presence of those dispositive facts that are dispositive of entire classes of rights or duties, not merely of individual ones, such as the fact of being born legitimate or of not being a woman and married. Marriage affects not merely the power of a woman to make some one contract, but to make any contract.

Possibilities.

The next step toward a complete right is a possibility of having a right. The word possibility in this sense does not mean merely that it is possible for the person to acquire the right. A may be able to buy B's house, if he chooses, and perhaps he may some day do so; but he is not therefore said to have a legal possibility of ownership in the house. A possibility in the legal sense arises when not only those general dispositive facts are present which confer upon the person a

ty to have the right, but some of the dispositive facts ıre special to that particular right also exist. Thus ı's eldest son, if he outlives his father, will be his But during the father's life his chance of acquiring his 's estate is a mere possibility. His being his father's son dispositive fact of his right; but the father's death in ın's lifetime without having otherwise disposed of the ty is an essential dispositive fact that does not yet exist ıay never exist.

Inchoate rights.

What is called an inchoate right or duty resembles a ility in depending upon the existence of a portion only dispositive facts of the right or duty. Thus a widow is ılly entitled to certain rights in her husband's land after eath, which are called her dower, and which are not ıd by the husband's alienation of the land. During the nd's life she has an inchoate right of dower, which is hing more than a mere possibility but less than a complete

Distinction between possibilities and inchoate rights.

; is probably impossible to lay down any general rule etermining in every case whether a given legal state is a possibility or an inchoate right or duty. But a few may be stated that will cover the majority of cases. If rson who is to have the complete right is uncertain, the ıt is a mere possibility. Thus if A has a power to appropriate property to any one of B's children, each of the children possibility of getting it. A chance of obtaining a which may be defeated by a disposition made by another, son's expectation of inheritance which the father can by alienating the property, or of acquiring a right by rformance of condition precedent or by some one else's of a condition subsequent, the right to take advantage condition, as it is called, so long as the condition has een broken, is usually a mere possibility, although a actually held upon a condition subsequent is a complete

Uncertainty of the person.

Chance of obtaining rights.

Compensation for future services.

But when a person is absolutely bound by contract ın act, and will be entitled to pay when he has done it, gh his right to the pay is in a sense conditional, since it ls upon due performance on his part, yet it is before per-

formance deemed an inchoate right and not a mere possibility. The law reckons that he will perform as he ought to. If a person is rendering services for another under an agreement that can be put an end to at the pleasure of either party, as where a man is hired to work for another but can be discharged by his employer at any time, his chance of future earnings would seem to be properly a mere possibility; but it is generally treated as an inchoate right and is assignable.

The fruits of a thing.

If a person has a right in a thing which would extend over the "natural product or expected increase" of the thing, the chance of acquiring a right in the product or increase is generally considered as an inchoate right, not a mere possibility.

Importance of the distinction.

275. The distinction between possibilities and inchoate rights is very important, because the law treats them very differently.

Assignability of possibilities and inchoate rights.

Inchoate rights may be transferred. Wages to be earned under a contract but not yet due may be assigned; or a man may sell the next calf that his cow bears, so that the calf will be the property of the buyer as soon as it is born without any further act of transfer. But at common law possibilities can not be assigned, although in some places and to some extent they have been made assignable by statute. An assignment by an heir apparent of his expectations or of the right to take advantage of the breach of a condition subsequent is void at law, although a condition may be released to the person who holds the right to which the condition is attached, such a release not being a transfer but an extinction of the possibility. And generally a possibility created by agreement may be extinguished by agreement.

Succession at death.

A possibility may pass at the death of the holder to his heir, executor or administrator. Thus if A grants land to B upon a condition subsequent, the right to take advantage of a breach of the condition is in A and his heirs. But executors and administrators are *quasi* universal successors, and are regarded as continuing the legal existence of the deceased person; and at common law so was the heir. Therefore succession at death is not really an assignment, since the successor is legally the same persons as

him to whom he succeeds. It seems now, however, to be pretty well established that whatever can descend can also be disposed of by will; and this applies to possibilities. But it is well known that a beneficiary under a will was originally regarded as taking *pro herede*, as a *quasi* universal successor.

Exceptions as to assignability.

276. There are however three exceptions to or qualifications of the rule that possibilities are not assignable *inter vivos*.

Accessory possibilities.

In the first place, if a possibility is accessory to a right which can itself be assigned, it may be assigned with it. Thus if A lets land to B for twenty years on a condition subsequent, the right to take advantage of a breach of the condition is accessory to the ownership of the land, and if A sells and conveys the land, the benefit of the condition goes with it.

Assignment operating as a *titulus*.

Secondly, an agreement which purports to be an assignment of a possibility or of the future right into which the possibility is expected to grow, or even of a right which the assignor merely expects to acquire in the future, may amount to a *titulus*, capable of being expanded by some future act constituting a *modus acquirendi* into a good title to the right itself. An example of this is found in certain sales of property which the seller expects to acquire mentioned in §606.

Equitable assignments of possibilities.

Thirdly, a possibility is susceptible of an equitable assignment, so that the assignor when he acquires the complete right will be bound to hold it for the benefit of the assignee or to transfer it to him. Thus if property is left by will to A on a condition precedent that he marries a certain woman, before the marriage he may make an equitable assignment to B, which a court of equity, after he has married and acquired the property, will compel him to perfect by making a legal assignment.

Exercise and violation of inchoate rights.

277. Inchoate rights can not be exercised, nor can they be violated so as to give rise to actionable wrongs or remedial rights of the ordinary kind. If A enters upon B's land and cuts down trees or demolishes a building, though the dower right of B's wife in the land be thereby much impaired in value, she can have no action at law against A for that damage. But in certain cases equity will interfere at the suit of the holder of an inchoate right to protect it.

Value of inchoate rights.

An inchoate right is also looked upon by the law as a valuable existing interest, and sometimes when property is taken for public purposes compensation must be made to holders of inchoate as well as of complete rights in the thing.

Legal treatment of possibilities.

A possibility, however, is not accorded in general any protection, even in the courts of equity. If land is taken for public purposes no compensation is ever made to the heir or the owner for the loss of his expectancy in it. Or if property is left to trustees to hold for the use of A during his life and after his death to B if he survives A, B's interest, depending upon a condition precedent, is a mere possibility, and B can not maintain a suit in equity against the trustees to prevent them from squandering the trust fund, as A might do or any one who had a right in the fund. So it has been decided, and no doubt correctly so far as this principle is concerned, that a person in whose favor a will has been made has no cause of action against another who by fraud induces the testator to change it to the former's prejudice, because during the testator's life the will has no effect, and a beneficiary named in it has a mere possibility.

CHAPTER XVII.

WRONGS.

278. Wrongs are divided into crimes and civil injuries, which are often called respectively public and private wrongs.

Crimes.

A crime is a breach of some duty, which is owed not to any individual but to the sovereign only, and is imposed by a rule of the criminal law. A crime is regarded therefore as an offence against the public, and gives rise not to a private suit but to a criminal prosecution in which the government is the plaintiff, and whose object is not to obtain redress for the injury but to punish the offender.

Mala in se and *mala prohibita.*

Acts which are criminal and also morally wrong are called *mala-in se;* those which, though treated as crimes, are not contrary to morality are only *mala prohibita, i.e. mala quia prohibita.* The same division applies to civil injuries. But for most legal purposes the distinction between *mala in se* and *mala prohibita* is not important.

Violations of rights in crimes.

No violation of any person's right distinct from the breach of duty is necessary as an element in a crime. It is true that most crimes include violations of the rights of private persons, *e.g.* such crimes as theft, robbery, cheating, or assault and battery. But there are also many crimes of which this is not true, *e.g.* having counterfeit money in one's possession with intent to utter it, selling intoxicating liquor without a license or smuggling. But even when a crime does violate private rights, the violation of right is not an element in the crime distinguishable from the breach of duty, but is a part of the breach of duty; the criminal act is defined by reference to such actual consequences.

Civil injuries

279. A civil injury is an act or omission which is a breach of some duty owed to a private person and which is followed as its consequence by a violation of the right to which the duty corresponds. There are thus two distinct elements in the wrong, first a breach of duty, and secondly a violation of

right. Neither alone amounts to a civil injury.[1] This distinction between the breach of duty and the violation of right and the principle that both must concur to make a wrong are of the utmost importance in the law of civil injuries. A civil injury is regarded as an offence against the person only whose right is violated, and is redressed by a civil action or proceeding brought usually in his name. No one but the injured party can in general bring an action for a civil injury. The object of a civil action is not punishment but redress. The sovereign may have rights resembling those of private persons, *e.g.* may own property or make contracts. If so, a violation of those rights is a civil injury rather than a crime whenever it would be so in the case of a right held by a private person.

Civil injuries against the sovereign.

The same act or omission may be both a crime and a civil injury, and subject the wrong doer both to a criminal prosecution by the state and a civil suit by the party injured; for instance theft, assault and battery or libel.

The same act a crime and a civil injury.

280. When the right violated in a civil injury is a right *in rem*, the wrong is called a tort.

Torts.

By the common law every action for a civil injury had to be brought in some one of certain established forms, which were called forms of action. The common law actions were divided, following the nomenclature of the Roman law relating to obligations,[2] into actions *ex contractu* and *ex delicto*. An action *ex contractu* was based upon a breach of contract; an action *ex delicto* was for a tort. Thus every civil injury was considered to be either a tort or a breach of contract, and the common law recognized formally no obligations except such as were created by contract. When it was necessary to enforce an obligation which was not really created by a contract, either the transaction out of which it arose was called a contract and classed arbitrarily among contracts, or else a purely fictitious contract to do the same acts which formed the content of the obligation duty was posited, and

Torts and breaches of contract.

[1] As to the possibility of a separation between the breach of duty and the violation of right and of either one occurring without the other, see § 250.

[2] See § 254.

the action for a breach of that duty was brought in the form of an action for a supposed breach of that imaginary contract.[3]

Although the common law forms of action are now, except in a few of the United States, abolished, the ancient classification of all legal wrongs into torts and breaches of contract is still maintained by many writers and courts. A common definition of a tort is, a civil injury cognizable at law other than a breach of contract, or, a wrong independent of contract.[4] Some authorities have even gone further and attempted to make the same classification embrace what are known as equitable wrongs, *i.e.* those where the duty and right violated are purely equitable, and which therefore are cognizable only in the courts of equity.

Definitions of tort.

Equitable wrongs.

It is believed however that the better opinion, and that to which the modern authorities are plainly tending, is that even under the common law many obligations exist that do not arise from contracts, as there certainly do in equity, and that the proper classification of civil injuries is not into torts and breaches of contract, but into torts and breaches of obligations, the true basis of the distinction being the nature of the right violated, whether that is a right *in rem* or *in personam*. All purely equitable rights being, as has been said, rights *in personam*, equitable wrongs are never torts.

Torts and breachea of obligation.

There is perhaps one exception to the above definition of a tort. A person who has a chattel belonging to another in his possession is often subject to a duty to restore it.[5] This duty perhaps corresponds not to the owner's right of property in the chattel but to a special right *in personam* analogous to a contract right. If so, a wrongful refusal to restore a chattel in violation of that duty would not be a tort within the above definition. But it is nevertheless classed as a tort.

Exceptional case of a tort.

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[3] See § 375.

[4] This definition was adopted in the English Common Law Procedure Act of 1852.

[5] This is the obligation described in § 800, on whose breach the common law action of detinue was based; see § 921.

CHAPTER XVIII.

STATES OF MIND.

281. The legal quality of a person's conduct and his responsibility for it often depend upon his state of mind. The states of mind that are important for legal purposes are the following.

Intention.

Intention relates either to the person's future conduct, as where a burglar breaks and enters a house with the intent to steal something after he gets in; or to the consequences of present conduct, as where a person makes a false statement with the intent that another person shall believe it and act upon it, or entices another's servants to leave him with the intent to break up his business and cause him damage. The former is simple in its nature and generally understood, so that nothing more need be said about it here. The latter calls for explanation.

Intention of consequences.

When a person does or omits an act with the intention of thereby producing a certain consequence, his intention includes two elements: (1) Some degree of belief or expectation that the consequence will follow his conduct. Plainly a person can not be said to intend a result which he has no idea will come to pass. (2) A desire for the consequence. That intention in the legal sense includes desire has been vigorously denied, and it has been said that a person must be taken to intend every consequence of his conduct which he foresees as at all probable or even possible,[1] *e.g.* that a doctor who amputates a patient's leg in a vain attempt to save his life intends to kill him.[2] But in the common law at least,

Expectation.

Desire.

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[1] Aust. Jur. Lect. XIX, XX. Austin, however, drew his materials mainly from the civil law.

[2] Austin does not use this illustration, but it is a logical deduction from what he says. His attention seems to have been confined to cases where the act would be wrongful, which apparently led him to include under intention certain states of mind which generally have the same effect as intention in making acts wrongful; see § 284.

however it may be in the civil law, it is well settled that intention includes desire.

Such an intention as is above described, *i.e.* the mere expectation of and desire for a certain result, may be called simple intention. But if the party knows the facts which make his conduct unlawful the intention is culpable or wrongful.[3] For instance if A, mistaking the boundary line between his land and B's, cuts timber on B's land supposing it to be his own, does he intend to cut B's timber? If simple intention is meant, yes. He intends the actual result which happens, the cutting of that particular timber, which in fact belongs to B. But if culpable intention is meant, no. He does not know the fact that makes his conduct unlawful, namely, the position of the boundary line. Simple and culpable intention.

282. A person is presumed to intend the natural and probable consequences of his conduct. This rule has three different meanings. Presumptions of intention.

(1) There is always a *prima facie* presumption to that effect. In the absence of proof to the contrary, it is a proper and legal inference that the person knows that such consequences will or may follow his act or omission and desires them. Thus if a person wilfully does an act having an obvious tendency to cause another's death, as by assaulting him with a deadly weapon, and such a result follows, it is presumed to have been intended. But this presumption is *prima facie* merely, not conclusive. The party is allowed to show, if he can, that he had in fact no such intention. The general presumption.

(2) If some further consequence is a necessary legal result of the consequence directly intended, the further consequence is also considered to be intended, whether the party actually had it in his mind or not; and this presumption is conclusive. Thus the law considers, *i.e.* conclusively presumes, that the assumption of a legal duty causes a person pecuniary damage; therefore if A by fraud induces B to make a contract with him and thus assume a duty to him, he neces- Legally necessary consequences.

[3] The expressions simple and culpable or wrongful intention are not in common use.

sarily intends damage to B, although the contract may be in fact an advantageous one to B.

Presumptions where intention is not necessary.

(3) It is sometimes said that a person is presumed to intend the natural and probable consequences of his conduct, when the truth is that intention is not necessary at all. This is a mere misuse of language due to a confusion of ideas.

Thus it was laid down in some of the early cases that to make a person liable in an action of tort for a false statement by which another has been injured, he must have made the false representation with an intent to defraud the other. And that statement having once obtained currency has been often repeated and is now generally spoken of as the rule. But in fact that rule is much too narrow. There are many cases where persons have been held liable for fraud where there was actually no such intention. Now if the true principle had been clearly perceived, the courts would probably have frankly abandoned the old rule and formulated the correct rule in other terms. But instead of doing so, they adhered to the old expression, continued to assert that a fraudulent intent was necessary, and then brought the cases where there was no such intent within the rule by means of the fiction—for in such cases it is a mere fiction—that the party intended the natural and probable result of his false representation. Such instances are not uncommon in the law, where, an old rule having been found inadequate, the courts, instead of restating the rule correctly, continue to adhere to the time honored expression, and make it cover the cases which it is desirable to bring within it by means of presumptions which are really fictitious.

Motive.

283. A motive means some desired consequence beyond the consequence directly intended, to which the latter consequence is desired as a mean; or it is the desire for such farther consequences. Thus if A persuades B's workmen to strike in order to injure B's business, the quitting work by the workmen is the consequence directly intended, and the resulting injury to B's business or the pecuniary loss thus caused to him, or A's desire for these, is the motive. Generally the motive with

h a person acts is immaterial for legal purposes; but times it is material.

284. When a person acts in such a way as to incur by his uct an unreasonably great risk of causing injury to himself hers, his state of mind may be any one of the following. States of mind prompting to unreasonable conduct.

(1) He may desire to cause the injury. If so, his state of l is intention. Intention.

(2) He may, without actually desiring the injury, yet be aware that he is taking an unreasonably great risk of ing it, but nevertheless for some reason of his own de- ately take that risk; as if the directors of a railroad pany, to save expense, should omit some precaution which knew was essential to their passengers' safety. This of mind is recklessness. Recklessness.

(3) He may not actually have before his consciousness the that the conduct is too likely to cause harm; but this be because he has deliberately refrained from inquiring, shut his eyes to what he ought to have seen. Thus ose that A is very desirous to have B make a certain ract with him, and in order to induce B to do so makes im a statement which is in fact false. It may be that A oses his statement to be true; but that he had knowledge rtain facts which ought to have raised in his mind a ient doubt of its truth to lead him to make some in- gation before venturing upon the statement, to "put him inquiry" as the ordinary expression is, and that if he investigated he would have found out the real truth. if he deliberately shuts his eyes against the evidence refuses to inquire for fear of coming upon unwelcome , he is taking an unreasonable risk of deceiving B when nakes his statement. This state of mind is one of the ties of bad faith or *mala fides*. Bad faith.

Intention, recklessness and bad faith are included under name of wilfulness; they have in common the element deliberate wrong choice. Wilfulness, when it means tion, always means culpable intention. Recklessness bad faith usually have the same legel effects as tion, and indeed are usually called intention; or, as Wilfulness.

has been already explained, the person guilty of recklessness or bad faith is said to be presumed to have intended the consequences which result from his conduct, which is only an indirect and inaccurate way of saying that those states of mind are in the circumstances legally equivalent to intention.

Bias.

285. (4) The person may fail to perceive that his conduct involves an unreasonably great risk, because, although he has considered the matter with what would ordinarily be sufficient care, his judgment was warped by interest, passion or prejudice of some kind, which prevented him from coming to a correct conclusion. Excessive desire to do a thing may have this effect, even though it does not so far influence the party as to lead him to act in actual bad faith. This is prejudice or bias. It somewhat resembles bad faith, but the element of deliberate wrong choice is wanting, so that it does not amount to wilfulness.

Carelessness.

(5) He may fail to perceive that his conduct is improper simply for want of attention. This is carelessness or, in Austin's phrase, heedlessness.

All the foregoing states of mind, except simple intention, are in some degree blameworthy.

Innocent mistake.

(6) But a person may so conduct himself as in fact to incur too great a risk by a mere error of judgment, after a careful, *bona fide* and unprejudiced consideration of the case. Thus if a city is bound to keep its highways in such a condition as to be reasonably safe for travelers, the officers of the city may after a careful and honest impection of a road decide that it is reasonably safe and that nothing needs to be done to it, and yet they may be mistaken. This is innocent mistake or error.

Actual malice.

286. Malice in the proper and ordinary sense of the word, actual malice, means a desire to injure or annoy another. It includes intention. Such a desire is often due to hatred or malevolence; but that is not necessary, nor is it necessary that any serious injury be intended. A desire to cause any harm or annoyance whatever, even though it arise from mere mischievousness, is sufficient to constitute actual

ice. But the harm or annoyance, as such, must be the thing desired and not merely the consequence or con-itant, however probable, of something else which is desired. s if A entices B's workmen to leave their employer for purpose of hiring them himself, his act is not malicious though he knows that the effect of their leaving will be njure B's business, the damage to B being then merely lental and not the very thing desired.

But the same kind of a change has taken place with rd to malice as with regard to intent to defraud mentioned 282. The rule having been laid down very early that ain kinds of conduct, *e.g.* the publication of libels and ders or the institution of groundless prosecutions, were wrongful unless done maliciously, and it being found dient to hold persons liable for such conduct in many s where there was really no malice, the courts, instead of ply declaring that malice was not necessary and proceeding efine the true ground of liability, kept to the old expres-, and then said that from certain facts malice would be lusively presumed, or resorted to the conception of what have called legal malice or malice in law, as distinguished actual malice. Actual malice is a state of the party's d, whose existence must be proved as a fact. Legal malice conclusion of law; it is inferred by virtue of a rule of from the existence of certain other facts, which do not hemselves constitute malice, or it consists in the existence uch facts. Legal malice.

Many attempts have been made to define legal malice, to declare what the facts are from whose existence the requires malice to be inferred, or on whose existence g proved the law treats the party, for certain purposes, as e were guilty of malice. But the truth is, there is no ral definition of legal malice. It means different things ifferent cases. Sometimes it includes a state of mind r than actual malice, usually wilfulness, and sometimes

no state of mind at all. Its meaning in each case must be separately learned.

287. Knowledge has in law two meanings.

Personal knowledge.

(1) In the strict sense, in which it is used in the law of evidence, it means only such information as a person has got from the immediate testimony of his own senses. A person is said to know, or to know "of his own knowledge," such things only as he has directly perceived, as distinguished from what others have told him, which latter is called hearsay.[4]

Notice.

(2) But for most legal purposes the word is used in a wider sense, equivalent to notice. A person knows or has notice of any fact which he has perceived or of which he has been informed, and which he does not in good faith disbelieve. If a person is informed of the existence of a fact, but the circumstances are such that a reasonable and prudent man in his place would not believe the information or would not even regard it as sufficient to put him upon inquiry, or if after a reasonable investigation he comes to the conclusion that the fact does not exist, and accordingly he disbelieves it, he can not be said to have knowledge of it, although he has been informed.

Constructive notice.

288. Notice may be constructive. That is, in some cases a person who has not actual notice of a fact will be presumed to have notice or will be treated as if he had notice. Thus if a person is in actual possession of land, that is constructive notice to all the world of any rights which the possessor has in or to the land, so that no one who deals with the land can plead ignorance of those rights.

Facts which one ought to know.

A person is often affected with constructive notice of a fact, or "charged with knowledge" of it, on the ground that he "ought to know" it. The word "ought" here does not necessarily denote a perfect legal duty to know, but often means rather that the person would have known had he acted reasonably or properly; it may thus express an imperfect duty. Thus if a person is bound to use care to do such acts as are necessary to accomplish a certain end, that

Negligent ignorance.

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[4] See § 1094.

includes a duty, perfect or imperfect, to use due care to find out what acts are necessary; and if the party omits to do so, he can not excuse himself for not doing the acts on the plea that he did not know that they were necessary. A duty for instance to use due care to keep a house in repair implies that the party must use due care to find out whether it needs repair. But a person is not charged in reference to one matter with all the knowledge which he would have had but for his negligence in some collateral or disconnected matter. The consequence of a single negligence do not haunt a man all his life. That is, a person is not chargeable with knowledge which his previous negligent conduct has prevented him from acquiring, unless such conduct was negligent with reference to the very matter for which the knowledge is important. Nor is a person conclusively presumed to know a fact merely because he had an opportunity to know it, or had reason to suppose that it existed, unless he is guilty of bad faith. He may nevertheless be actually ignorant of it. Also there is no rule of law which requires a person to be charged with knowledge of everything which he has formerly known but has forgotten. Forgetting is not in itself negligence.

Collateral negligence.

Opportunity of knowledge

Forgotten facts.

Facts which are generally known are *prima facie* presumed to be known to every person. For example, every one is presumed to know that illuminating gas is explosive. But it was decided that in 1866 there was no such presumption as to nitro-glycerin, that being a substance then recently introduced and whose properties were not generally known. But probably that presumption is not legally conclusive. Probably if in any case a person was sought to be charged with knowledge of a fact on the mere ground that the fact was generally known or on the ground of "the teachings of common experience," which it has been said the law requires all men to know at their peril,[5] he would still be allowed to prove, if he could, that he actually did not know it.

Facts generally known.

289. Belief of a fact means that the existence of the fact has a certain degree of probability in the party's mind. Perhaps

Belief.

[5] Holmes, Common Law, 57.

it is impossible to give an exact legal definition of what degree of probability is necessary to constitute belief, or what degree of doubt is inconsistent with it. The question whether a person believed a thing has to be in practice decided as one of pure fact.

Reasonableness of belief.

The question of the actual existence of belief must, however, be carefully distinguished from that of the reasonableness of the belief or the existence of reasonable grounds for it. A person's belief, except when he gets it from the direct testimony of his own senses, is derived by inference from data known to him. Now if the data justify the belief, if, that is, to a reasonable and prudent man possessed of the same data the fact would appear to have as great a degree of probability as it has to the person who believes, then the belief is reasonable, is founded upon reasonable grounds; if not, the belief is ill founded and unreasonable. But a person may actually and in good faith believe a thing, although he has no good grounds for believing it and his belief is wholly unreasonable, *e.g.* a person may honestly and sincerely believe in witchcraft. But the fact that a person had no reasonable ground to believe is evidence to show that he did not really believe, though it is not conclusive.

CHAPTER XIX.

REASONABLENESS AND NEGLIGENCE.

Reasonableness.

290. Questions of reasonableness often arise in law; *e.g.* has something been done whthin a reasonable time? what is a reasonabla price for a thing? had a person reasonable grounds for believing as he did? was a person's conduct unreasonably likely to cause harm?

The conduct of a reasonable man.

The test of reasonableness is in general what an ordinarily reasonable and prudent man, an average member of the community, would have done or judged to be reasonable in the situation of the party whose conduct is in question. It does not therefore depend upon the party's own state of mind, but is a quality or attribute of conduct. If a person in fact acts in an unreasonable manner, that may be due to wilfulness, prejudice, carelessness or mere innocent mistake on his part.[1] But that is of no importance in judging of the reasonableness of his conduct. The question is not what he himself thinks to be reasonable, but what is reasonable according to "the general judgment of reasonable men."

Reasonableness not a state of mind.

Meaning of the party's situation.

The party's situation, as the word is here used, consists of such facts and circumstances as are actually or constructively known to the party, and a reasonable and prudent man in that situation means a reasonable and prudent man who had knowledge of such facts and circumstances. It is very easy to be wise after the event, and, looking back upon a person's conduct, to say in the light of fuller experience that it would have been better if he had acted differently. But a person is to be judged according to the knowledge which he had when he acted, not by that which he did not and could not have. It may be in fact very dangerous to drive a heavily loaded wagon over a weak and rotten bridge; but if the bridge appeared to be sound and the party did not know it to be

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[1] See § 284.

otherwise, a reasonable and prudent man might venture upon it.

Reasonableness as a question of fact or of law.

291. Whether given conduct in given circumstances was reasonable is usually a question of fact. The test being the conduct of an ordinarily reasonable and prudent man, the jury is supposed to consist of just such men, so that they will be able to say of their own knowledge how such a man would have acted. Therefore it is proper that the question should be left to the jury as one of fact. But in a perfectly plain case, where there is no room for doubt how a reasonable person would act, the court will decide the question of reasonableness as one of law. Such a decision becomes a precedent, and amounts to laying down a rule as to what shall be considered reasonable conduct in that kind of cases. A considerable number of such rules have been thus introduced into the law.

Rules as to what is reasonable.

Examples of such rules.

Thus a person who crosses a railroad track ought to use reasonable care not to get run over. But the courts have laid it down as a peremptory rule that in ordinary circumstances reasonable care requires that he should look both ways for coming trains before crossing. If he does not do that, his conduct is unreasonable and negligent as matter of law, and the court would not permit the jury to find as a fact that he had acted reasonably no matter what other precautions he might have taken. On the other hand the courts have refused to hold as law that it was unreasonably dangerous to let a child five years old play in the street of a city unattended, and in any particular case would leave it to the jury to decide whether in view of all the circumstances it was so.

Negligence.

292. In regard to negligence there are two questions, namely: (1) What is negligence in its own nature? and (2) When is negligence forbidden by law? Only the former is considered here; the latter will arise when duties come to be taken up. These two questions are usually confounded, and negligence is commonly defined as consisting in a breach of some legal duty. The reason for this confusion is that the question whether a person's conduct was negligent never becomes practically important, and therefore never comes up

in a court for decision, unless the negligence would be a breach of duty; so that the actual question which the court has to decide is not as to the existence merely of negligence but of negligence as a breach of duty, of actionable or culpable negligence. Therefore if the court decides that there has been a breach of duty consisting in negligence, it usually declares simply that the party has been guilty of negligence; while if no such breach of duty appears, the court will generally express this by saying, though not always with strict accuracy of expression, that the party has not been negligent. The distinction, however, between negligence as such, which does not *per se* involve any breach of duty, and wrongful or actionable negligence, which does, is of importance. The only use of the conception of negligence in law is as an element in the definition of duties. We define negligence in order that we may afterwards be able to define various legal duties as duties not to act or omit negligently. To define negligence as a breach of legal duty, and then to define the duty as a duty not to act negligently, would be defining in a circle. We must therefore find a definition of negligence that is independent of the idea of duty.

Negligence is taking an unreasonable risk.

293. Negligence is conduct which involves an unreasonably great risk of causing injury to the actor himself or to another or to his or another's property or interests. The mere taking a risk, even knowingly and voluntarily, is not necessarily negligent. Every one does that every day of his life. Many common and necessary acts, such as driving in a crowded street, travelling by rail, carrying a loaded gun, using fire or kerosine, are more or less dangerous. Even a very great risk may in some cases be properly incurred, for example in the attempt to save another's life. But when the risk is so great as to be in the circumstances unreasonable to be taken, then the conduct becomes negligent. Negligence, therefore, like unreasonableness generally, is not a state of the party's mind, but a kind of conduct.[2] It is usually due to carelessness or reck-

The party's state of mind

[2] When, however, inattention to what one is doing makes the act more dangerous, the want of attention may be an element in negligence.

Negligent acts and omissions.

lessness, but may come from mere innocent mistake. It may consist in either acts or omissions, in doing dangerous acts or in omitting to take precautions against danger. Negligent omission, especially negligently omitting to enforce one's rights, is called *laches*. If the party guilty of negligence knows that his conduct involves an unreasonable risk, or would know if he acted in good faith, so that his state of mind is wilfulness, the conduct is wilful negligence.[3]

Laches.

Wilful negligence.

Due care.

Conduct which does not involve an unreasonable risk is known as due or reasonable care. So that due care, like negligence, is not a state of the party's mind. Care is inversely as risk. To take much care of a thing is to expose it to little risk; to take little care is to expose it to great risk; to take due care is to expose it to no more risk, whether much or little, than is in the particular case reasonable.

Knowledge and skill.

294. Sometimes failure to use skill or special knowledge is negligence. Whenever a person's conduct is likely to cause injury which may be averted by the use of skill or special knowledge, it is negligent not at least to use such skill and knowledge as the person actually has to prevent the harm.

But very often a reasonable and prudent man would not attempt to act at all unless he had competent skill and knowledge. In such a case any person who does attempt to act must use such skill and knowledge, *i.e.* must do what he undertakes as well as he would do it if he had them, whether he in fact has them or not. Not to do so is negligence, and it makes no difference that he does the best he can. Two questions arise here: (1) In what cases must competent knowledge and skill be exercised? and (2) What degree of knowledge or skill is required?

Representations of skill.

295. Whenever a person undertakes to do anything for another under an express or implied representation that he has competent knowledge or skill, so that he is relied upon as having

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[3] Some authorities have denied that negligence can consist in acts or that it can be wilful. But that opinion arises from the erroneous idea that the essence of negligence is carelessness, and that negligent conduct is always conduct due to carelessness.

it, he is bound to have and use it. Such a representation is *prima facie* implied by setting oneself up to practice a trade or profession or being employed for pay in any work requiring skill or knowledge. A carpenter, a shoemaker, a smith, a person who makes it his trade to collect debts, an agent or broker, a physician, a lawyer, must know his business or be answerable for his blunders.

Gratuitous services.

When services are rendered gratuitously, there may or may not be an implied representation of skill or knowledge. If they are rendered in the course of one's trade or profession or if pains have been taken to invite people to come and avail themselves of those services, skill and knowledge are usually implied. Thus a charity patient in a hospital has the same right to skilful and proper treatment as if he paid for it; and the directors of a savings bank serving without pay must still exercise competent skill and knowledge. But in ordinary friendly services and mere acts of kindness it would generally be understood that no special skill or knowledge were represented as possessed.

Friendly services.

Dangerous acts.

And apart from the practice of any trade or profession, and although there is no employment or special relation between the parties, if a person voluntarily does an act or enters upon a course of conduct where special knowledge or skill is necessary to prevent danger to others, it is negligent not to have and use knowledge or skill. This applies to such acts as navigating vessels where there is danger of collision, running railroads or elevators, building a dam that is likely to give way and do damage if it is unskilfully built, and many other acts.

Acts done under compulsion.

If the work is not voluntarily undertaken but is imposed upon the party by some authority or necessity, he is not responsible for want of skill. Thus "if the crew of a steamer were so disabled by tempest or sickness that the whole conduct of the vessel fell upon an engineer without knowledge of navigation or a sailor without knowledge of steam-engines," he would not be liable for want of such knowledge. "So again, a person who is present at an accident requiring immediate provisional treatment, no skilled aid being on the

spot, must act reasonably according to common knowledge, if he acts at all; but he can not be answerable to the same extent that a surgeon would be."[4]

Degree of knowledge and skill.

Competent knowledge or skill does not mean the highest degree, nor even the skill of the most skilled person in the trade or profession. What is required is "that reasonable degree of learning, skill and experience which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community and those conversant with that employment as necessary and sufficient to qualify him to engage in such business."

Gross and slight negligence

296. If a person takes a risk which is much greater than is reasonable, his negligence is called gross; if the risk is only a little too great, it is called slight. Generally if a person is negligent at all, it makes no difference whether his negligence is gross or slight. If he is under a duty to use due care, *i.e.* not to act negligently, any negligence, however slight, amounts to a breach of his duty and puts him in the wrong. But when a person's liability depends upon the presence of some culpable state of mind, such as recklessness, intention or malice, gross negligence is evidence of the existence of such a state of mind, but mere slight negligence is not. Thus it is often said that gross negligence, though not in itself fraud, is evidence of fraud.

Grose negligence evidence of fraud.

Degrees of care in bailment.

297. When one person undertakes to perform services for another or has another's chattel in his possession, which is called bailment,[5] he often comes under a duty to use due care to perform the services properly or to keep the chattel safe. In that case there are said to be three degrees of care, slight, ordinary and extreme care. If the bailment is for the benefit of the bailor[6] only, no more than slight care is required, as when one person does a friendly service for another without

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[4] Pollock, Torts, 25, 26.

[5] See § 381.

[6] The bailor is the person for whom the work is done or the owner of the goods; the bailee is the person doing the work or having possession of the goods.

pay or receives another's goods for gratuitous storage. If it is for the benefit of both parties, as in the case of hiring, where a price is paid, ordinary care must be used. If it is for the bailee's sole benefit, as in a gratuitous loan of a chattel, extreme care is necessary, Ordinary care means the care of an ordinarily reasonable and prudent man, as above decsribed. It has been found difficult to define extreme and slight care; but they mean respectively something more or less than ordinary care. Opposed to these degrees of care there have been said to be three degrees of negligence, namely slight negligence, which is the absence of extreme care, ordinary negligence, which is the absence of ordinary care, and extreme or gross negligence, which is the absence of even slight care. The division of care into three degrees in cases of bailment is well established; but the corresponding doctrine of three degrees of negligence is now generally rejected,[7] and negligence is taken to mean the failure to use such care as is required in the particular case, due care; so that if only ordinary care were required the omission of extreme care would not be called slight negligence, it would not amount to negligence at all.

Degrees of negligence in bailment.

298. There are therefore two quite different senses in which degrees of care and negligence may be spoken of, namely: (1) The ordinary sense, in which extreme care means simply that no more than a small risk, and slight care that a large risk, may be taken,[8] gross or slight negligence means simply falling much or little below the required standard of care, and neither care nor negligence is susceptible of division into three or any fixed number of degrees; and (2) The peculiar sense of the law of bailment, with three degrees of care and, according to some authorities, of negligence. The overlooking of the distinction between these two sets of meanings has led to much confusion in the language of the authorities.

Degrees of care and negligence.

The ordinary meaning.

The peculiar meaning in bailment.

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[7] "Gross negligence," it has been said in this connection, "is only negligence with a vituperative epithet."

[8] See § 293.

Burden of proof.

Exceptions.

299. As a general rule the law presumes that people act with due care, and he who asserts that another has acted negligently has the burden of proving it. The exceptions are: (1) in cases where extreme care is required, and an injury happens that may have been due to want of care, as when a railroad train runs off the track and a passenger is hurt, (2) where the party charged with negligence had control of the thing that caused the injury and the injury is one of a kind that does not usually happen without negligence, as where a bale of goods fell out of the window of a warehouse upon a person passing by in the street, (3) where a chattel is bailed and perishes or is injured in the bailee's hands and no explanation is forthcoming of how it happened, (4) where skill or special knowledge is required and the injury may have been due to the want of it; in those four cases negligence will be *prima facie* presumed; *res ipsa loquitur*.

Res ipsa loquitur.

CHAPTER XX.

POSSESSION

300. Possession is a situation of fact in which a person stands in relation to a thing.[1] Actual possession includes two elements, namely, power over the thing and the will to possess or *animus possidendi*. In the fullest and completest sense it would mean the power, so far as that depended upon the possessor's relation in space to the thing possessed, to use the thing in any manner whatever and to exclude all other persons from any interference with it, and the will to maintain such a position and wholly to exclude others. But it seldom exists in so full and complete a form; much less than that may amount to actual possession.

Possession a fact.

Actual possession.

As to power; manual prehension or physical contact with the thing is not always necessary. Any power of using and excluding others arising from proximity in space is probably enough, provided there is no other person having equal or greater power and a will to possess. A man may doubtless have actual possession of his cane which he has laid down by his side for a moment. If two persons are present in a house, the owner and a guest, the owner will have actual possession and the guest not, although the latter has for the time being as much power as the former; but if both claimed the possession, probably neither would have actual possession till he had expelled the other. A hunter does not get possession of a wild animal which he is pursuing till he has captured it, because till then he has no power over it; and another may lawfully step in and take it before him.

Power.

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[1] The fact of possession must be distinguished from the right of possession. Only the former is treated of in this chapter. Some writers on the civil law maintain that possession in the legal sense is always a condition of right rather than of fact. However that may be in the civil law, it is not so in the common law. The civil and the common law theories of possession differ widely in many respects.

Will.

As to the will to possess; in the Roman law only a person who held as owner was, except in a few cases, considered to have true juridical possession; that is, *animus possidendi* must amount to *animus domini*. Such is not the rule of the common law. At common law the hirer, borrower or depositary of a thing, though setting up no claim of ownership, is a possessor. But the will to possess must be a will to maintain a control over the thing. A mere meddling with it is not a taking of possession, for instance going upon another's land to hunt or fish, or beating another's horse. There must also be a will to exclude others from the thing to some extent, but not necessarily entirely. If the possessor, retaining his own power of use, admits others as mere licensees expellable at his pleasure, he does not lose his possession, as where a man brings guests to his house or carries passengers in his ship.

Detention.

301. Detention, which is also called natural or physical possession, is a situation closely analogous to possession. It exists when a person has the power necessary to possession without the will, as where one picks up a thing to examine it; or where he has the power and the will both, but the law, by an arbitrary rule, denies him possession. The only case of much importance in the common law is that of a servant. A servant who has the custody of his master's property in the course of his service does not have possession of it, but mere detention, the possession remaining in the master.[2]

Servant.

Constructive possession.

302. Constructive possession is where the law treats a person as if he had possession. He may or may not at the same time have actual possession; but one person can never have constructive possession when another has actual possession. If the constructive possessor does not himself have the actual as well as the constructive possession, then no one has it. Constructive possession depends upon certain presumptions, which fall into five groups, namely:

Presumptions as to possession.

(1) Certain presumptions arbitrarily created by the law or by custom, not reducible under any principle.

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[2] See § 1222.

(2) Presumptions as to the continuance of possession.

(3) Presumptions derived from the presence or absence of a right.

(4) Presumptions based on the situation of the thing.

(5) Presumptions depending upon the identity of the thing.

Arbitrary presumptions.

303. As examples of the first sort of presumptions, several different customary rules prevailing among whalers in different seas as to when possession shall be considered to be gained of a whale have been held valid by the courts.

The continuance of possession.

304. Under the second class, possession once begun is deemed to continue until it is shown to have been abandoned or become impossible, as by the thing having been lost or destroyed, or that some one else has possession. This presumption can not be rebutted by proof merely that it is not true, *i.e.* that no one is in actual possession. The possessor of a horse does not lose his possession by leaving it hitched to a post in the street while he goes into a house.

Presumptions based upon rights.

305. Under the third head, the general rule is that a person's possession must be presumed, so far as reasonably can be done, to be in accordance with his right. If the possession would be wrongful, it will, if possible, be presumed that the party is not in possession.

Possession wrongful.

Possession merely permitted.

If the possession would not be wrongful but the party has no protected right of possession, there is no presumption. For example, if a person picks up a lost article merely to examine it, he does not get possession till he decides to keep it; but it is rightful for him, if he chooses, to take the possession in order to keep it for the owner. There is, however, no presumption either that he does or does not intend to take possession.

Where the party has a right.

If a person has a right to the possession of a thing, he is deemed to be in possession of it, unless it appears that he has parted with the possession, that possession is impossible or that some one else has the possession. For example vacant land is in the possession of its owner. Since the person who has a right to the possession is generally the owner, this is often expressed by saying that ownership draws to it the possession.

Presumptions based on the situation of the thing.

306. As to the fourth class of presumptions, those based upon the situation of the thing, the question is whether and in what cases a person is presumed to have possession of a thing merely from having possession of the place or receptacle in which it is. If the possessor of the place knows that the thing is there and intends to possess it, he probably has possession. But when he does not, the authorities are very conflicting and the law on this point is enveloped in much doubt.

Presumptions based on identity.

307. Lastly, presumptions as to possession may depend upon the identy of a thing. It is possible for a person to have possession of the whole of a thing, as a whole, without having possession of the parts as separate things, for example, of a locked box full of goods but not of the separate articles in the box.[3]

Possession of land.

The most important of the rules falling under this head relate to the possession of land. The general principle

Rightful possession.

is that if a person who has a right to take possession of a piece of land takes actual possession of a part of it, his possession so acquired extends over the whole, provided it all lies in the same county, but not if it is in different counties.[4]

Possession under color of title.

If his possession is wrongful but he has what is called "color of title," that is, if he takes possession by virtue of some deed or transaction giving him an apparent right, the general rule is that his possession extends, within the limits

Possession of a mere intruder.

of the county, as far as his apparent right. But if he is a mere intruder without even a color of right, then no presumptions are made in his favor, and the area of his possession is limited to that of his actual occupation or *pedis possessio*.

Possession through another.

308. A person may hold possession through another, as a master through his servant. This may be actual possession; a master has actual possession of his goods in his servant's custody, the servant being a mere instrument. But when

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[3] See 1222.

[4] The original reason for this distinction was in certain old rules as to the incapacity of a jury of one county to inquire about events happening in another county; see §1099.

goods belonging to one person are in the hands of another who himself has possession, as where a thing is hired, borrowed or deposited for storage, the owner can not have actual possession. In such cases he is often said to have constructive possession; it is said that the possession of the hirer or borrower is the possession of the owner. But this seems incorrect; it is certainly in conflict with the principle that one person can not have constructive possession of a thing of which another has actual possession. However, a person who, although not in either actual or constructive possession of a thing, has a right of present possession of it, that is, who has a right to take it from the possessor immediately if he chooses, has, as against third persons, substantially the same rights as if he were already in possession. If any third person wrongfully meddles with the thing, the person having the right to the possession may have the same kind of an action against him as if he were the actual possessor, as will be hereafter explained. But a person who will merely have a right to the possession at some future time can not be treated presently as a possessor.

The right of present possession.

A possession which some other person has a right to put an end to at his pleasure is called a precarious possession. Thus the finder of a lost article who takes it into his possession to keep for and restore to the owner, a borrower of a thing or a wrongful possessor has a mere precarious possession; but if a person hires a thing for a fixed time, so that during that time the owner can not take it back from him, his possession is not precarious. The name precarious is also applied to rights which are held at the will of another person, as the right of a borrower or of a person who has been given a mere license to use another's land which the giver can revoke at any time.

Precarious possession.

Precarious rights.

309. The possessor of a thing is *prima facie* presumed to be the owner; and as against a mere wrongdoer, who meddles with the thing without any right, this presumption is conclusive. In an action by the possessor, suing as owner, the wrongdoer is not allowed to set up any *jus tertii* in his

Possessor is presumed to be owner.

defence, that is to prove that the ownership or right of possession is really in a third person.[5]

Successive possessions.

Therefore if there have been two possessions of a thing, both in fact wrongful, the earlier possession may be valid against the later. Thus if B steals A's horse and has possession of it, and then C takes it from B, and B sues C for the wrong, B's prior possession, though wrongful as against A, would be proof enough of his ownership in his action against C, and C would not be allowed to assert that A and not B was the true owner.

Quasi-possession of rights.

310. Possession is properly of things; but there is also what is called possession, or more correctly *quasi*-possession, of rights. This expression has two meanings. (1) A person who really has a right is sometimes said to possess it, possession in this sense meaning simply having, just as in ordinary language the things that a person owns are called his possessions. As a technical legal term this is incorrect and should be avoided. (2) A person who *de facto* exercises a right, whether he actually has such a right or not, is often said to be in the possession or *quasi*-possession of it, as where A constructs a road from his house to the street across B's land and uses it as if he had a right of way there. Just as the possessor of a thing is *prima facie* presumed to have a right of possession, so a person who *de facto* exercises a right is *prima facie* presumed to have the right; *e.g.* a man and a woman living together as husband and wife are presumed to be married, or a person acting as a public officer is presumed to be such. But whether this presumption is conclusive against a mere wrongdoer or intruder, as in the analogous case of the possession of a thing, is doubtful.

Having a right.

The *de facto* exercise of rights.

Presumption that the party has the right.

Adverse possession.

311. The *de facto* exercise of a right under an express or implied claim or assertion by the party exercising it that he has such a right, whether the claim is made in good faith or not, if the exercise is in derogation of another's right and is not by that other's permission, is called adverse

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[5] So is the weight of authority, though some decisions have admitted the *jus tertii* in certain kinds of actions.

possession or adverse user. If the right exercised includes the right of possession of a thing, the thing may be said to be adversely possessed, though properly adverse possession applies to rights rather than to things. In derogation of another's right means either that the user is an actual violation of that right, as where A wrongfully uses a right of way across B's land, or at least that the right exercised, if it actually existed, would constitute a burden upon the other's right. Thus if A and B own adjoining pieces of land, and A has a house upon the edge of his land with windows that overlook B's land, A may acquire what is called a right of light and air in B's land, that is, a right that B shall not build anything on his land within a certain distance of A's windows so as to obstruct them. This would be a burden upon B's ownership, inasmuch as it would prevent him from freely using and enjoying his land. If now A makes windows in the side of his house toward B's land, then so long as B does not actually obstruct them, A is *de facto* enjoying a right of light and air in derogation of B's property right, although no right of B is actually violated. A user, however, is not in derogation of another's right unless that other has the right to put a stop to it in some way. But the exercise of a right without any claim to it is not adverse possession, as if A squats upon B's land acknowledging that he has no right there and that he occupies only on sufferance. Adverse possession is of great importance in law, because, as will be hereafter explained, the adverse possessor may in course of time acquire by means of it the right which he has been *de facto* exercising.

CHAPTER XXI.

FRAUD.

Kinds of fraud.

312. Fraud is of three kinds: (1) misrepresentation, (2) breach of trust, and (3) entering into a transaction with an intent to use it as a means of injuring another. Actual fraud includes in every case a bad state of mind, which is called in law intent to defraud, though it does not always consist of intention in the proper sense but sometimes of recklessness or bad faith. Constructive fraud exists where the law treats a person, for some purposes at least, as if he had such an intent. The name constructive fraud is sometimes, though not with strict propriety, applied to certain other facts or acts which in some respects resemble fraud and have to some extent the same effect, such as unlawful coercion by which a person is induced to make a contract or an unlawful purpose in the parties to a contract, which makes the contract invalid.

Actual fraud.

Constructive fraud.

Effects of fraud.

313. The effects of fraud in general are four, namely: (1) It may amount to a wrong, for which an action will lie; this is actionable fraud. (2) It may render a contract or other juristic act invalid. (3) It may create an estoppel in pais. (4) It may be a ground for a court of equity to refuse to the party certain remedies to which he would otherwise be entitled. Any actionable fraud can have all the other effects; but the converse is not true. An act, for instance a false representation made with an honest belief in its truth for the purpose of inducing another to enter into a contract, or undue coercion applied to the other party for that purpose, may make the contract invalid, or without making it invalid at law may be a sufficient reason why a court of equity will not lend its aid to enforce it, and yet the act may not be fraud in any such sense that an action will lie to recover damages for it.[1]

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[1] See § 327.

314. A fraudulent misrepresentation is a false affirmation made to a person with an intent thereby to defraud him or another, as if A, in order to induce B to buy his old and spavined horse for a high price, tells B that the animal is young and sound. It need not be made in words, but may be by acts, such as filing a horse's teeth before selling him to make him look young, using false weights or measures or imitating another person's trademark. Generally, however, mere silence or omission to act is not a fraudulent representation, at least at law; one party to a transaction has a legal right to keep his mouth shut and allow the other party to proceed under a mistake. For example if A knows that there is a gold mine on B's land of which B is ignorant, and he goes to B and buys the land for a small price, not telling B of the mine, that is not fraud at common law. But there are a few kinds of contracts, which are said to be *uberrima fide*, in which a contrary rule prevails, and the mere omission by one party to disclose facts known to him material to the transaction will invalidate the contract, though this will not amount to actionable fraud. Also where one party to a contract stands in a fiduciary relation to the other, for example if he is his agent, partner, legal adviser or trustee, and they make any agreement about the subject matter of the relation, any concealment of material facts by the former will generally have the effect of fraud in equity, so that a court of equity will annul the contract.

Misrepresentation.

Manner of making.

Silence.

Contracts *uberrima fide*.

Parties standing in a fiduciary relation.

315. A representation means an affirmation or statement of the existence of a fact, not a mere promise. For a person to break his contract, no matter how wilfully or deliberately or with what intent to injure the other party, is not a fraud; not even, according to the weight of authority and except in the case of a promise to pay for property purchased, although at the time of making the contract he intended not to perform it; but on this last proposition the authorities are not quite harmonious

Representations must be of fact.

Promissory representations.

It has also been held that a representation about a matter of law, *i.e.* a statement that the law is so and so, or about the party's own state of mind, *i.e.* that the maker of

Matters of law or the party's state of mind.

the representation has a certain belief, desire, intention or motive, though false and made with an intent to deceive and injure the other party, can not amount to a fraud; for instance if A induces B to sell him his property for less than it is worth by falsely telling him that he wants it for some charitable use. Sometimes this rule is put upon the ground that such representations can not be material, or in the case of representations of law that every one is presumed to know the law and therefore can not for legal purposes be deceived by a false statement about it, which is a mere fiction. But on this subject the authorities are somewhat conflicting. False representations of these kinds have in some cases been held fraudulent, and many fine distinctions have been drawn.

Intent to defraud.

316. A representation, however false and however much injury it actually causes, is not fraudulent unless it is made with an intent to defraud. A person may mislead and deceive another, greatly to the latter's damage, by a misstatement made in perfect innocence, through ignorance or some mistake; but that is not fraud. An intent to defraud is divisible into two parts, of which the first is an intent to deceive.

Intent to deceive.

Intent to deceive is an intention to make the person to whom the representation is addressed believe something which is not true. It may addressed to a particular person, or to any one of a class of persons or to the public as in the case of a deceitful advertisement or prospectus. This

Belief of the representation.

implies that the maker of the representation knows or believes it to be false; a person is not guilty of fraud for asserting what he honestly believes to be true, and this even though his belief is not founded on any reasonable grounds.[2] However it seems that the word intention in this connection is not used in its strictly proper sense. Recklessness or bad faith in making a representation is equivalent to intent to deceive. If a person makes a statement without knowing or caring whether it is true or not or whether its effect will be

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[2] See § 289.

to mislead the other party, he is guilty of fraud, although he may not have had any actual belief that it was false or any actual desire to deceive. Thus if A tells B that C, who has applied to buy goods from B on credit, is solvent and honest, whereas he is insolvent and a rogue, A having absolutely no knowledge whatever about C or his affairs, that may amount to a fraudulent misrepresentation. But mere negligence in making a statement is not fraud, for example if a false report on the condition of property is made after a hurried and careless inspection; though gross negligence is evidence of fraud.[3] But in contracts *uberrima fide* or when there is a fiduciary relation between the parties, a misrepresentation even made in good faith will invalidate a contract.

Contracts *uberrima fide* and fiduciary relations.

317. But an intent to deceive is not the whole of an intent to defraud. A person may be deceived without being defrauded, as where one is led to mistake a work of fiction for a narrative of facts or a lady's artificial complexion for a genuine one. An intent to defraud in the proper sense would include an intent that the person deceived should act upon the false impression that has been implanted in his mind to the injury of himself or some one else. But as to this aspect of it, intent to defraud in the legal sense does not mean actual intention, and probably not even recklessness. Mere negligence is probably enough. That is, a person is guilty of fraud if he intentionally or recklessly deceives another in such circumstances that he thereby takes an unreasonably great risk, that the danger is unreasonably great, that the other will act on the false statement and that injury will result. The court would probably say that he must be presumed to have intended the probable consequences of his be act of deceit.[4]

Intent to injure.

318. The person injured may be the person who is deceived or another. If A fraudulently imitates B's trade-mark and thus causes C to buy his inferior goods instead of the superior goods of B's make which he intended to buy, C, the person deceived, is injured; but if A's goods are

The party defrauded.

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[3] See § 296. [4] See § 282.

exactly like B's and in every respect as good, C is not injured at all. In either case, however, B is injured and defrauded by losing the sale of his goods. So in a very famous case where a tradesman by false representations induced a boy's father to buy a defective and unsafe gun as a present for his son, and the gun burst in the boy's hands and injured him, the court held it a fraud upon the boy for which he could have an action against the seller

Breach of trust.

319. The second kind of fraud is breach of trust. The nature of this can not be fully explained till the subject of trusts is reached; but in general it may be said that a breach of trust is committed where any property or authority is put into a person's hands and accepted by him to be used only for a special purpose for the benefit of another, and he uses it for any other purpose; *e.g.* if A by his will leaves money to B, for B to invest and pay the income to A's wife so long as she lives and after her death the principal to A's children, which is a very common form of trust, and B appropriates the money to his own use or pays to the wife as income what is really a part of the principal, B is guilty of a breach of trust.

Transactions to injure another.

320. The third kind of fraud is entering into a transaction with an intent to use it to injure another. Thus where a wife and her paramour persuaded the husband to consent to a separation and to execute a deed securing to her a separate maintenance, with the secret purpose of thereby enabling her to carry on more conveniently her adulterous intercourse, the husband was allowed to set aside the deed as obtained by fraud.

Frauds on creditors.

321. Of this kind of fraud the most usual case is found in agreements intended to defraud creditors. The law on this

Fraudulent conveyancee.

subject is laid down in the statute of 13 Eliz. concerning fraudulent conveyances, which however is generally regarded as being merely declaratory of the common law. That statute enacts that all gifts, grants and conveyances of goods, chattels or land made with intent to hinder, delay or defraud creditors are void as against parties who would be prejudiced by the fraud, unless made to a *bona fide* purchaser for a

good consideration.[5] That is, the creditor may disregard the transfer and seize the property in satisfaction of his debt as though it still belonged to the debtor. If the debtor makes the transfer actually for the fraudulent purpose mentioned, then, if the person to whom it is made knows of the fraud, it makes no difference whether he pays the debtor for the property or not, or even that he pays its full value for it; he can not hold it against the creditor. And even though he does not know of the fraud, he can not resist the creditor's claim if he takes the property as a mere gift paying nothing for it.

Fraudulent gifts.

But the statute does not say that a gift by a debtor not made with a fraudulent intent shall be void. On that point, however, the courts have laid down certain rules of presumption based on the principle that a man ought to be just before he is generous and not give away his property instead of paying his debts. As a general rule a gift by a debtor of any portion of his property is constructively fraudulent as against his existing creditors, and a creditor may seize the property in the hands of the donee. But as to future creditors the gift is not fraudulent, if in the circumstances, considering the amount of the debtor's property and of his indebtedness, the gift is reasonable and not excessive, and there is nothing to show an intention to cheat future creditors; and some courts have held that in such cases the presumption of fraud was not conclusive even as to former creditors. But if a person heavily indebted should give away a large portion of his property, even though he left himself with enough to pay his present debts, and should then proceed to contract a large new indebtedness, there would be at least a *prima facie* presumption, especially if there were any other suspicious circumstances, of an intent to defraud the new creditors. But except in case of such an actual or constructive fraudulent intent, a debtor still remains owner and *dominus* of his own property, and has a legal right to spend it unlessly and foolishly if he chooses, or to give it away, with which right a creditor can not interfere.

Presumptions of fraud.

[5] A good consideration in this act means a valuable consideration; see § 364 Void means voidable; see § 323.

CHAPTER XXII.

JURISTIC ACTS.

1. Juristic Acts in General.

Juristic acts.

322. A juristic act is an act done with the intention thereby to create, transfer or extinguish some right or duty, which act is appointed by law for that purpose and will have that effect if done under proper conditions and by competent persons. A contract, a marriage, the appointment of an agent, the payment of a debt, the taking possession of a thing with the intent to become the owner, are juristic acts; but the commission of a wrong is not, although that gives rise to remedial rights.

Valid and invalid acts.

323. A juristic act is either valid or invalid, and an invalid one may be entirely void or merely voidable. A valid act is one that is capable of producing and does produce a legal effect. A void act has no effect at all, and is

Void acts.

as if it had never been done. This may happen because the parties who attempt to do the act have no legal capacity to do such acts or because the act is improperly done or for other reasons. However, a juristic act which can not take effect in the manner intended by the parties may sometimes be valid as an act of another sort. Thus a written instrument intended as a conveyance of land but invalid as such for want of a seal may yet be good as a contract to convey.

Voidable acts.

A voidable juristic act is one that is valid when done and may always continue so, but some person has the right at his option to rescind it and make it void. Thus an infant, *i.e.* a person under twenty one years of age, can not make a valid gift of his property. If he attempts to do so, the gift is voidable. It is not generally void; the donee becomes by the transaction the owner of the property; but the giver may at any time before he comes of age, or

within a reasonable time thereafter declare the gift void and take back the property. If he does not do so, the gift remains prefectly valid.

Rescission.

324. A person who rescinds a juristic act must rescind it *in toto;* he can not avoid that part of it only which is unfavorable to himself and let the rest stand. Therefore it is a general rule that the party must restore, or offer to restore, everything which he has received, and put the other party into the same situation as if the act had never been done. If he can not do so, he has no right to rescind. Thus if A fraudulently induces B to sell him his property for less than it is worth, and B wishes to rescind the sale and take back the property, he must pay or tender back to A the price. Or if it is the buyer who has been defrauded, he must restore the thing bought before suing for the price; and if he has destroyed or otherwise disposed of the thing so that he can not restore it, his right to rescind is gone.

Restitutio in integrum.

Essentials of juristic acts.

325. The essentials of juristic acts in general are proper and competent parties and the intention of the parties, properly expressed, to do the juristic act.

Unilateral and bilateral acts.

Where only one party is required to perform a juristic act, the act is said to be unilateral. The taking possession of a thing, the judgment of a court, a statute or an offer to make a contract is a unilateral act. If two parties are required, as in contracts, the act is bilateral; if more than two, it is sometimes called bilateral and sometimes trilateral, quadrilateral, *etc.*

Competency of parties.

The parties must be competent to do the act. Normal persons are presumed to be competent, and usually are competent, to perform most juristic acts. The subject of the capacity of abnormal persons belongs elsewhere.

Intention

The parties must intend to do a juristic act, that is, to affect legal rights or duties. A mock marriage ceremony gone through with in mere sport or a mutual promise by two persons to take a walk together, neither party intending to bind himself legally and each understanding that the other does not so intend, is not a juristic act and has no force in law. But when parties express in an appropriate manner

Presumption of intention.

an intention to do a juristic act, there is a strong *prima facie* presumption of law that they actually had such an intention as they have expressed, and if either party asserts the contrary the burden is on him to disprove the intention.

Acts binding by estoppel.

And if one party is deceived by the other's expression and takes the transaction seriously as a real juristic act, the other may be estopped to deny that it was such, and so it may become binding by estoppel.

326. The will or intention which is essential to a juristic act may be vitiated by mistake, fraud or coercion.

Mistake.

Mistake generally has no legal effect. That is, if a person is led to do a juristic act under the influence of a mistaken belief, the act is usually none the less valid. If A has a gold mine on his land and not knowing of its existence sells the land for a low price, the sale is valid. The same is true even though the mistake is caused by a false representation made to one party by the other or by the wilful concealment of the truth by the other, unless the misrepresentation or concealment is actually or constructively fraudulent. But if money is paid or property transferred without any consideration,[6] under a mistake of fact, it may be recovered back; for instance if A owes money to B and pays it to C supposing him to be B, or if, having once paid it, he pays it a second time through forgetfulness. There is no intention to make a gift, and the case is the same as if the recipient had got possession of the money or property without the consent of the owner, *e.g.* by finding. But money paid or property transferred under a mistake of law is generally not recoverable; as for instance if A's son has committed a wrong against B, and A, supposing himself to be legally responsible for his son's misconduct, which he is not, pays money to B in compensation. This rule is sometimes said to be based upon a conclusive presumption that every person knows the law and therefore can not legally fall into such a mistake.

Mistake of fact.

Mistake of law.

Relief in equity against mistake.

327. Courts of equity however will generally refuse to enforce agreements obtained by false representations or

[6] See § 364.

wilful concealment of facts, even though these do not amount to fraud, and will leave the parties to their remedies at law.[7] And in many cases these courts will interfere and set aside juristic acts done or cancel written instruments executed under the influence of a mistake of material facts, and sometimes even under a mistake of law. The rules as to when this may be done are too unsettled and complicated to be gone into in an elementary treatise.[8]

Reformation of written instruments.

One important case of this is in the reformation of written instruments. If two persons make an agreement and then attempt to reduce their agreement to writing, and by mistake the writing is wrongly drawn, so as not to express the true agreement of the parties, a court of equity on the application of one party will reform or correct the written instrument, so as to make it express what the parties really intended. But if the writing truly expresses what one party intended but the other party understood the arrangement differently, the writing can not be altered. There is no reason why one party's meaning should be favored rather than the other's; so the court will let the writing stand as the parties made it. This is usually expressed by saying that equity will only reform a written instrument when the mistake is mutual. But if one party has fraudulently procured the writing to be wrongly drawn, equity will reform it against him on the application of the party defrauded, even though there has been no mutual mistake.

Mutuality of mistake.

Mistake caused by fraud.

Effect of fraud on juristic acts.

328. In general the effect of fraud upon a juristic act is to make the act voidable by the party defrauded against the party guilty of the fraud. No one but the party defrauded or his successor in right can rescind the act for fraud. If a man induces a woman to marry him by such fraud as makes the marriage voidable, no one but she can bring an action to annul the marriage. If A is indebted to B, and B assigns the debt to C, A can not refuse to pay to C on the ground that he procured the assignment to him from B by fraud. If A transfers his property to B to put it out

Who may rescind for fraud.

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[7] See § 313. [8] See § 788.

of the reach of his creditors, that is a fraud upon the creditors only, no one but they can complain of it; as between A and B the transfer is valid, and neither of them can rescind it on the ground of fraud. So fraud does not give any right to rescind against a party who is entirely innocent of any participation in it. If in the example last above given B had been innocent of the fraud and had bought and paid for A's property in good faith, the creditors could not interfere with his possession, even through A's intent in selling was a fraudulent one. So if a third person by fraud induces a woman to marry a man, the husband not being privy to the fraud, the marriage is not voidable at the suit of the wife. But a fraudulent juristic act can be avoided as against any successor of the party who committed the fraud, unless the successor is a *bona fide* purchaser for value. A *bona fide* purchaser means one who at the time when he took the right and paid for it or bound himself to pay for it did not know of the fraud; and a purchaser for value means one who has given a substantial valuable consideration for his right. If B fraudulently induces A to sell or give his property to him, and then sells it to C, and C pays B a substantial price for it, not necessarily as much as the thing is worth but more than a merely nominal price, not knowing of the fraud, C is a *bona fide* purchaser for value, and the original contract of sale between A and B, though infected with fraud and voidable by A as against B, can not be avoided against C, but C may keep the property. Since the sale to B was not void, C as B's successor has become the owner of the property, and as his claim to it is in equity and justice as good as A's, the law will not permit it to be taken from him. But if C had obtained it from B gratuitously, as by gift or as B's heir or executor after his death, or if C had known of the fraud when he bought it from B, then A could have rescinded the sale as against him and taken back the property from him.[9] This doctrine of the rights of a *bona fide* purchaser for value is of great importance and frequent

Against whom an act may be rescinded.

Bona fide purchasers for value.

[9] See § 271.

application in the law. However, if the transaction between A and B had been entirely void and not simply voidable, as if B had stolen the property from A, then A could have taken it back from C notwithstanding he was a *bona fide* holder for value; because in that case neither B nor C would ever have become the owner of it.

Duress.

329. Unlawful coercion, is either duress or undue influence. Duress by imprisonment is where a person is wrongfully imprisoned and forced to do some juristic act, *e.g.* execute a deed or a contract, in order to obtain his liberty. The imprisonment need not be in a jail or prison; it may be in any place. But it must be unlawful. If a man is lawfully imprisoned, however unjustly, the imprisonment is not duress.[10] Duress *per minas* consists of threats of immediate death or of mutilation amounting to what is called mayhem or maiming.[11] A threat to beat a person, or to burn his house or otherwise injure his property or to slander his good name is not duress. For such injuries a person may have a legal remedy; but there is no adequate remedy which the law can give for the loss of life or limb. Moreover the threats must be made in such a manner and in such circumstances as to induce a reasonable belief that they will be executed. A person is not subjected to duress who yields to silly and groundless fear. The threats may be of injury to the person himself or his wife or family. However, in the modern law the doctrine of duress or unlawful compulsion has been extended a little beyond its ancient limits, in so much that money paid to obtain the possession of one's property which is unlawfully detained may be recovered back by the payer on the ground that it was paid without consideration.[12]

Money paid under coercion.

Effect of duress.

Duress has the same effect as fraud both at law and in equity; that is, it usually makes juristic acts voidable at the option of the party subject to the coercion and against the party practising it and his successors unless the latter are *bona fide* purchasers for value.

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[10] As to what imprisonment is lawful and what unlawful, see §§ 736, 933.

[11] See § 1317. [12] See § 364.

Method of rescission.

When an act is voidable for fraud or duress it can usually be avoided by the act of the party himself, by a mere notice to the other party, without resort to any court.

Undue influence.

330. But the courts of equity go much farther, and in an action brought for that purpose will avoid any agreement obtained by what is known in those courts as undue influence, that is, "any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment."[13]

The actual exercise of undue influence in a particular case is a fact to be proved by the party seeking to rescind the juristic act. But in certain cases its presence is *prima facie* presumed, and then the party who maintains the validity of the act must prove its absence.

Exercise of influence presumed from its existence.

Whenever one person is shown to have habitually a controlling influence over another, which he might naturally exercise in any transaction with him, and obtains any advantage from that other, for example a gift of the latter's property or a sale of it to him, it will be *prima facie* presumed that the advantage was obtained by such influence. It is not necessary to show the precise manner in which the influence was exerted. Indeed the very object of the presumption is to obviate the necessity of making such proof, because such transactions are usually secret, and tangible proof of any specific act of undue influence can not usually be given.

Its existence presumed from the relations of the parties.

But this position of habitual influence may itself be presumed to exist from some relation in which the parties stand to each other. Here there is a double presumption; first, the existence of the influence is presumed from the situation of the parties, and then the exercise of the influence in a particular case is presumed from its existence. It follows therefore that when a person standing in a dominant

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[13] See Pollock, Contracts, 503.

relation to another obtains any benefit by the latter's juristic act, and the doer seeks to rescind the act by a suit in equity, the burden is on the recipient to prove that the transaction was fair and free. Such relations as those of parent and child, guardian and ward, even for a time after the child or ward has come of age and is legally competent to do juristic acts, lawyer and client, trustee and *cestui que* trust,[14] and in general any relation of trust and confidence where one party naturally relies upon and submits to the guidance of the other, will raise such a presumption against the dominant party. This rule has even been applied to spiritual and medical advisers.

From what relations the presumption is raised.

Although concealment of facts or a false statement made in an honest belief of its truth generally does not amount to fraud, and although it is not generally fraudulent to buy another's property for a low price or even to accept it as a mere gift, yet in all cases where a presumption of undue influence exists, the party against whom it is raised can not rebut it except by showing that he made a full, fair and true disclosure to the other party of all the material facts within his knowledge relating to the subject of the transaction and paid a fair price for what he received. It follows therefore that a gift or a sale for an inadequate price by a person who is proved or presumed to be under the influence of another to the latter may always be rescinded in equity at the suit of the former. But even though no concealment or misstatement is present and an adequate price is paid, the presumption of undue influence may still exist and require to be rebutted by proof of the fair and honest nature of the transaction.

Concealment, misrepresentation and absence of consideration in relation to undue influence.

331. The intention to do a juristic act must be expressed. The secret intentions or understandings of the parties, to which they have not given expression, can not be taken account of as elements in the juristic act.[15] If the law prescribes the manner in which the partie's will is to be expressed, the juristic act is called a formal one; if not, it is said to be formless. Thus the law usually requires a will

Expression of intention.

Formal and formless juristic acts.

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[14] See § 779. [15] See § 233.

to be in writing, subscribed by the testator and attested by a certain number of witnesses; it is therefore a formal juristic act. But most kinds of contracts can be made without writing or any prescribed forms, the intention of the parties being expressed in any manner that they please, by words or conduct. In those places where marriage is required to be celebrated before a magistrate or clergyman, it is a formal act; but a marriage made by the mere agreement of the parties, which in some places is perfectly valid, is formless. In a formal juristic act the form is something more than mere evidence of the parties' intention; it is in and of itself an essential part of the act, without which the act can not be done.

Effect of forms.

Writing as a form.

332. Writing is sometimes a form and sometimes not. When the law requires a juristic act to be done in writing, so that without writing there is no juristic act at all, or none of the kind intended, as in the case of deeds, wills, promissory notes and certain other transactions, the writing is a form. When the law does not require writing, even though the parties choose to make use of it, it is not a form.

Writing as an element in the act and as evidence.

There is also an important difference between a writing which, whether required by law or not, is a part of the juristic act, where the act is done in writing, and a writing which is merely in the nature of a memorandum or narrative, which may be evidence of a juristic act having been done, but is not itself a part of the act. Thus a contract of partnership or of insurance need not be made in writing. But such contracts usually are put into written form. If so, the writing is part of the contract; and generally the existence and terms of the contract can only be proved by producing the writing, and the parties are not permitted to prove by any other evidence that the real agreement between them was different from that expressed in the written instrument.

Receipts for money.

But a receipt for money paid is merely evidence of the payment. The juristic act of payment is not accomplished by the writing but by the corporeal delivery of the money, and the payment would be just as well made and just as effectual in law for all purposes, if no receipt were given.

The receipt is a mere narrative or acknowledgement convenient as a means of proving the fact of payment, and may be made at any time after the payment, no matter how long after. Therefore a receipt is never conclusive upon the party who has given it. He is always permitted to show, if he can, that the receipt is wrong or was given by mistake, and that he never in fact received the money. The receipt is only *prima facie* evidence of payment. Sometimes the law requires the doing of a juristic act to be proved by written evidence, and will not accept any other evidence; but even this does not necessarily make the writing a part of the act or make the act a formal one.

A receipt is not conclusive.

Requirement of written evidence.

333. In the reign of Charles II a statute was enacted in England entitled "An Act for the Prevention of Frauds and Perjuries," but which is more commonly known as the "Statute of Frauds." This famous statute provided in substance as follows: that all conveyances and transfers of rights in land, except leases at will[16] and certain leases for not more than three years, must be in writing; that no action shall be brought to charge any executor or administrator on any promise to pay damages out of his own estate, or to charge a person upon any promise to answer for the debt, default or miscarriage of another, on any agreement made on consideration of marriage,[17] on any contract for the sale of real property,[18] or upon any agreement not to be performed within one year from the making thereof, unless the agreement or some note or memorandum thereof is in writing; that express trusts[19] in real property shall be manifested and proved by writing, and that assignments of trusts shall be in writing; that no contract for the sale of goods, wares and merchandize for the price[20] of £10 or upwards shall be allowed to be good, unless the buyer shall accept and receive some

The statute of frauds.

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16 See § 489.

17 See § 364. This is held not to apply to mutual promises to marry.

18 See § 443.

19 See § 786.

20 By Lord Tenterden's Act in the reign of Geo. IV the word "value" was substituted for "price."

part of the goods, or give something in earnest to bind the bargain or as part payment, or some note or memorandum of the bargain shall be made in writing. All writings required by the statute must be signed by the party to be charged or by his agent, and in the case of transfers of real property the agent must be authorized in writing. Substantially similar statutes, called by the same name, have been passed in the United States, not all of them, however, identical in phraseology with the English statute. In some places the courts have held that the writing must state the consideration[21] of the agreement, when a consideration is necessary, and in other places the contrary has been decided.

The writing.

Statutes of frauds in America.

Statement of consideration.

Effect of these statutes.

334. Much doubt and difference of opinion has arisen as to the precise effect of these statutes upon the transactions to which they apply; whether the writing which they require is a part of the transaction, so that the statutes have created new classes of formal juristic acts, or whether their intent is merely to require written evidence in certain cases, the transactions themselves remaining formless juristic acts as they were before the statutes; whether, in other words, those statutes belong to the substantive law, the law of juristic acts, or are mere rules of evidence belonging to the adjective law. The practical importance of the question lies in this: (1) If those statutes relate to the form of the juristic act, then the writing must be made at the time of the transaction, there is no juristic act at all without the writing; whereas if the writing is merely evidence, it may be made at any time, even after a suit has been begun, and indeed the requirement of it may be waived by the parties, as all rules of evidence may; and the act itself takes effect from the time when it was really done. (2) A writing which is to take effect as a juristic act must be delivered,[22] but a mere memorandum available as evidence need not be. (3) If the agreement is made in one place and an action to enforce it is brought in another, as to the substantive law the law of the place where the contract was made, *lex loci contractus*, usually governs

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[21] See § 364 [22] See § 337.

in deciding upon its validity, while the application and effect of rules of evidence is controlled by the law of the place where the suit is brought, *lex fori*.

It has generally been held that when those statutes require a transaction to "be in" or to "be made in" writing, the requirement is one of form and the writing is an essential part of the transaction; but that when it is merely directed to be "manifested and proved" by writing or a "note or memorandum" to be made in writing, the statute is a mere rule of evidence. But the decisions conflict somewhat, that conflict in many cases being due to differences in the wording of the various statutes.

Part performance in equity.

335 The courts of equity, however, have introduced an important exception to the statute, inconsistent with its words but based upon the equitable principle that the statute which was made to prevent frauds shall not be turned into an instrument for committing fraud. If one party to the contract has partly performed it, the court will enforce it, the part performance being deemed sufficient proof that such a contract was in fact made. This is called taking the contract out of the statute. But marriage is not a sufficient part performance to take a contract out of the statute, because the express words of the statute forbid its being so regarded; nor is the payment of money, because if the contract is not performed the money can be recovered back by the party who has paid it in an action at law on the ground of a failure of consideration.[23]

Marriage or payment money not part performance.

Meaning of writing.

336. Writing may be done with a pencil; and the word writing includes printing and all means by which words may be impressed upon paper, parchment or any other material, as by engraving or lithographing. Generally a written instrument must be signed in order to have any effect. The signature need not be placed at the end of the writing, which is the usual and proper place, but may go anywhere in it, except in a few cases where by statute an instrument is required to be subscribed, which means signed at the bottom.

Signature of written instruments.

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[23] See § 380.

If the person having to sign is unable to write, some other person at his request may write his name for him; generally he then makes his mark, in the form of a cross with the pen, which is usually placed between the first and last names, thus: "John $\overset{\text{his}}{+}_{\text{mark}}$ Smith."

Delivery of written instruments.

337. When a juristic act other than a will is done in writing, the writing has no effect until it is delivered. If A draws up a deed or promissory note agreeing to pay money to B, and keeps it in his own possession, it amounts to nothing. Delivery must be to the person who is to acquire rights under the instrument or to some one for him. Sometimes a writing instead of being delivered immediately is deposited with some third person to be delivered by him on the performance of some condition. For instance a deed of conveyance of land sold may be executed and deposited, to be delivered to the buyer when he pays the price. A condition precedent may be attached to the juristic act in this way instead of being expressed in the writing. A writing so deposited is called an escrow, or in the United States is commonly said to be put in escrow. An instrument can not be delivered as an escrow to the party to whom final delivery is to be made nor to any one acting for him, but only to a third person. An escrow is so far delivered that the depositor can not take it back so long as the condition may still be performed, and when the condition is performed and the delivery made accordingly, it will relate back and the instrument will operate from the time of the first deposit, at least if that be necessary to give validity and effect to the juristic act. An instrument, if delivered at all, is *prima facie* presumed to have been delivered on and to take effect from the day of its date. But if it has no date or has a false date, the true time of delivery may be shown. A false date therefore does not affect the validity of an instrument. Delivery is not required of a will, which is not intended to have any force till after the testator's death, nor of any writing which operates merely as evidence and is not a part of a juristic act. Thus a receipt for money need not be delivered; and trusts, which by the statute of frauds are not required to be created but

Escrow.

Date.

When delivery is not necessary.

only to be manifested and proved by writing, have often been established by writings executed by the party creating the trust but kept by him in his own possession and found among his papers after his death.

Attestation by witnesses.

338. Certain instruments, such as wills and deeds of land, are required to be, and any written instrument may be, attested by the signatures of witnesses. Then if any dispute afterwards arises as to the genuineness of the document or its due execution, the witnesses can be called to prove it. When witnesses to a document are required, they must be called to testify in such a case, or one at least of them must, unless it be shown that this is impossible, for instance that they are all dead or out of the jurisdiction of the court. If a witness can not be produced, his signature may be proved, and this is *prima facie* proof of the genuineness and due execution of the instrument. But other evidence may be given on this point.

Acknowledgement of instruments.

339. In some cases also the parties to an instrument must go before a notary public, justice of the peace or other public officer appointed for that purpose, produce the instrument before him and acknowledge that they have executed it, or in some places that they have executed it freely. He must certify upon the writing the fact of the acknowledgement. This entificate is *prima facie* proof that the instrument was duly acknowledged, and sometimes, but not always, also of its genuineness and proper execution by the parties named in it. Occasionally instruments are so acknowledged when the law does not require it. When a party is a married woman, the officer is in some places required to examine her privately to find out whether she has executed it freely and without any compulsion from her husband.

Acknowledgement by married women.

Stamps.

340. Sometimes for the purpose of raising revenue the law directs stamps to be affixed to certain documents. Often as a matter of convenience blank forms are prepared and sold by the government already stamped. If the stamp is omitted, the instrument can not be used as evidence in any legal proceeding and the parties may also be subject to a penalty.

Construction of words.

341. When the intention of the parties to a juristic act is expressed in words, the question may arise what the words mean. Theoretically this question refers to the actual intention of the parties. The court assumes that the parties had a certain intention which they endeavored to express in words, and that the task before it is to find out what that intention was. But in most actual cases where any doubt arises this assumption is untrue; either the parties had no intention at all, *i.e.* some unexpected circumstance has come up and the words have to be fitted to a situation of fact which was never actually contemplated by the parties, or they had different intentions, each one supposing that the other's intention was the same as his own and the words used being susceptible of either meaning. In such cases the court, assuming that the parties meant what they said, proceeds to determine the true and proper meaning of the words.

Two questions arise: (1) what facts extrinsic to the words themselves may be referred to to ascertain their meaning? and (2) what do the words mean in the light of such extrinsic facts? The first is properly a question of evidence, how may the meaning be proved; the second, of interpretation or construction.

Direct evidences of intention.

342. Under the first question; evidence to prove the meaning of the words is either direct or indirect. The former consists in the statements of the parties themselves as to what they intended by their words or what they understood them to mean, or the testimony of other persons who are acquainted with the meaning of the words as to what they properly signify. In accordance with the principle that the intention that enters into a juristic act is the expressed intention of the parties only, the former kind of direct evidence is in most cases rejected by the court as inadmissible. A party to a juristic act is not permitted to come into court and testify that when he used certain words he intended them to carry a certain meaning; nor is any other person permitted to testify what a party has told him or what he has heard a party say as to the meaning of his words.

In regard to the second kind of direct evidence, the

court is conclusively presumed to know, or in technical language it takes judicial notice of, the meaning of English words, and no evidence is permitted to be adduced to inform the court on that point. But the meaning of words in a foreign language, technical terms and provincial or slang words may be proved to the court by witnesses acquainted with their meaning.

Meaning of English words.

Foreign, technical and slang words.

343. An exception to the rule excluding direct evidence of the parties' intention is found in the case of what is called a latent ambiguity. An ambiguity is where the words used are capable of two or more meanings or applications. If the ambiguity appears upon the face of the written instrument, so that on merely reading the instrument itself it can be seen to be ambiguous, it is called a patent or open ambiguity. But if it is not so apparent, if on its face the instrument appears to bear but one meaning, but in fact there are two or more persons or things to which the words can apply, the ambiguity is said to be latent. Thus if a man by his will should leave property to his son, describing it as "my house in New York," which is apparently quite plain, but it turned out that he had two houses in New York, there would be a latent ambiguity. In such cases direct evidence of the party's intention is admissible to remove the ambiguity; for example in the case just mentioned it may be proved that the testator before his death had declared which house he intended the son to have. But a patent ambiguity can not be thus removed.

Patent and latent ambiguities.

An inaccuracy is different from an ambiguity. It occurs when the words used to designate a person or thing are incorrect, as where a person is mentioned by a wrong name, which is called a misnomer, or a thing is wrongly described. Generally an inaccuracy has no effect, if the person or thing intended can be made out. *Falsa demonstratio non nocet.*

Inaccuracy.

344. Indirect evidence is evidence of facts and circumstances connected with and attending the transaction. This is usually admissible and often necessary to identify the persons, things and matters mentioned in the words of the juristic act and to show the meaning and application of the words. Thus if one person should write to another offering to buy his horse

Indirect evidence to explain words.

for a certain price and the offer was accepted, and afterwards it turned out that the seller had two horses, it would be proper to prove, in order to show which one was referred to, that one of them had already been offered to the buyer at a higher price, that he had taken that one for a time on trial but had refused to buy him at the price first demanded, and that nothing had ever passed between the parties at all about the other horse.[24]

Contemporaneous construction.

So the manner in which the juristic act has been acted upon by the parties or persons interested in it is proper to be taken into consideration to ascertain its true meaning. This principle is particularly applicable to old statutes which have long been obeyed as law by persons generally.[25]

Extrinsic evidence to contradict or vary writings.

345. When a juristic act is done in writing, is expressed in a written document or in a group or series of documents, and the writing purports to contain the entire juristic act, it is conclusively presumed to contain it all, and it is not allowable to prove by other evidence that the parties had some further or different intention, not expressed in the writing, forming a part of the same juristic act. This rule is commonly, but less accurately, stated in the form that the terms of a written agreement can not be varied or contradicted by extrinsic or parol, *i.e.* oral, evidence. Thus if property has been sold by a written agreement specifying a price in money payable at a certain time, the buyer will not be permitted to prove that it was orally agreed between the parties at the time of the sale that the price might be paid in goods or services instead of money, or that if the buyer was not able to pay at the time fixed in the writing he might have a longer time. But he might prove that such an oral agreement had been made subsequently to the sale as a separate and independent transaction, since that would not go to show that the original contract was different from what the writing showed it to be, but merely that the parties had afterwards changed it, which they have a right to do.

Subsequent oral agreement.

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[24] Markby, Elements of Law, § 175.

[25] As to the effect of customs on the construction of juristic acts, see § 18.

346. This rule, however, does not prohibit the production of evidence going to show that the parties did not really intend to do a juristic act at all, or that the act was for any reason invalid, *e.g.* that it was procured by fraud or duress. Proof that the act is invalid.

Nor does it preclude proof that any right conferred upon any person by the written instrument is to be exercised by him for a particular purpose only or to be held by him in trust for some one else. There is a difference between showing that the writing was not intended to confer the right which it purports to confer, that the juristic act was not what it appears by the writing to be, and showing that that right, being exactly what the writing declares it to be, is to be used in a particular way. Thus if A makes a deed of a piece of land to B, apparently conferring upon B the full and unconditional ownership of the land, it can not be proved that the real intention of the parties was that B should take the land only for his life or for a term of years, or that he should only become the owner on a condition. That would contradict the deed. But it may be proved that A was indebted to B and that the ownership of the land was transferred to B merely as security for the payment of the debt, so that after the debt shall have been paid, B, although he will still continue to be the owner, will then hold the land as trustee for A. That does not contradict the deed. All that the deed purports to convey to B is the legal ownership, and that B gets. The trust in favor of A is an equity merely, not recognized in the courts of law but enforceable only in a court of equity, which court when the debt is paid will compel B to convey the land back to A. Therefore the existence of the trust or equity is not inconsistent with the deed, and its enforcement does not in any way affect the operation of the deed, but calls for the making of another deed. When evidence is offered to establish an equity of this sort, dehors the written instrument, counter evidence is always admissible to rebut the equity by showing that there was no intention to create any such trust. If for instance A, having B's money in his hands, buys property with it, by B's consent, and has the legal ownership conveyed to himself, a Evidence to raise equities

Evidence to rebut equities.

court of equity will presume *prima facie* that the parties intended that A should hold the property in trust for B. But this equity may be rebutted by extrinsic proof of a contrary intention.

What kind of evidence.

In all these cases of establishing or rebutting an equity direct evidence of intention may be resorted to, because the object of the evidence is not to show what the intention was that entered into the juristic act itself, but to show an intention external and collateral to that act, relating to the use to be made of the right conferred by the act. In some cases the statute of frauds requires the equity itself to be proved by writing. But that depends upon a different principle, and the writing offered to establish the equity is still extrinsic and foreign to the principal juristic act.

Interpretation and construction.

347. The second question in §341 estates to the interpretation or construction of words. A distinction has been taken between interpretation and construction, the former, it is said, relating to the meaning of particular words and phrases and the latter to the effect or operation of the words. Thus if in a will the following words should be found: "I give and bequeath to my brother J. S. all the residue of my property, in the full confidence that he will use it for the support and education of my children;" the question whether the testator intended that his brother should have the property as his own without being under any legal obligation toward the children, or whether the property was given him in trust for the children, so that if he accepted the gift at all he would be bound to use it for their benefit, whether, that is, the testator intended to express a mere desire or hope not legally binding or a positive mandate creating a legal duty, is a question of construction. But if it appeared that the testator had both legitimate and illegitimate children, the question whether the word "children" as used in the will included both classes or only the legitimate children, would be one of interpretation. But it is usual and convenient to use the words construction and interpretation indifferently as synonymous.

Rules of construction.

It is plain that no rules can be laid down beforehand

that shall in all cases be a complete guide to the court in this process of construction. In many cases all that the court can do is to look at the words and form its own conclusion as to their fair and reasonable meaning. Yet there are certain rules of construction that the courts resort to for aid; the most important of which are the following.

Ordinary meaning of words.

Technical terms.

Deeds more strictly construed.

348. Words generally, if the context will admit, are presumed to be used in their common and ordinary sense. Technical legal terms are presumed to be used in their technical sense. The latter rule is more strictly applied to deeds than to other documents such as wills, letters or memoranda. The reason for this is said to be that deeds are usually drawn up by lawyers and executed with deliberation, while wills and ordinary contracts are apt to be made hurriedly by persons unlearned in the law and without professional assistance. But perhaps the true reason may be that deeds are a very ancient kind of instrument and certain strict methods of construing them got fixed in the law at a period when the law cared more for forms and technicalities and less for good sense and reasonableness than in modern times.

Unusual meanings.

But if in connection with the context or as applied to the extrinsic facts and circumstances proved, the ordinary or technical sense of the words gives no meaning at all or an absurd, unreasonable, unjust or unlawful meaning, then the court may interprete the words in some other sense. Thus if a man by his will leaves property to his children, he is presumed to mean his legitimate children, that being the ordinary legal signification of the word. But if he describes them as his children by a certain woman, who is not his wife, the context forbids that interpretation and shows that illegitimate children were intended. So if the will contains no description of the children, but it is proved that the testator had no children except illegitimate ones, that makes it evident that the word children could not have been used in its technical sense.

The context.

349. In the interpretation of words, and particularly of written documents, the whole must be construed together;

each particular part must be explained by the context; words or phrases must not be torn from their connection and treated as if they stood alone; *noscitur a sociis.* Moreover the construction, if possible, should be such as to give effect to all of the words; it is not to be presumed without necessity that the parties have inserted any wholly superfluous, useless or meaningless words.

Thus the preamble of a statute may be referred to to show the meaning of the statute. In a case where ale was sold in barrels, and the barrels were to be returned to the seller or, if not, to be paid for at the rate of $2 apiece, the buyer claimed the right to keep the barrels on paying for them. But the court said that he was bound to return them, the provision for payment being intended to apply only to the case of their being lost or destroyed so that they could not be returned. This was put on the ground that otherwise the words "the barrels to be returned" in the contract would be of no effect.

Writings *in pari materia.*

Also when the same parties have done several juristic acts or prepared several documents about the same subject matter or in the course of the same transaction, as the technical expression is, *in pari materia,* they are all to be construed together as though they constituted a single act or document.

Reasonable construction.

350. The construction must be a reasonable one; the court ought not put a strained, unreasonable or foolish construction upon parties' words, or quibble over them, or, as the common phrase is, "split hairs." Thus the word "men" may include women; and if a person hires a horse for a month it is understood to be a part of the contract that the hirer shall feed the horse, even though this is not expressed.

Ut res valeat.

351. When the language of a juristic act is capable of two constructions, one of which will make the act valid and lawful and the other will make it invalid or unlawful, the former is to be preferred, *ut res magis valeat quam pereat.* It is not to be presumed that the parties intended to do a nugatory or wrongful act. Thus where in a bond for the repayment of money lent it was doubtful from the words of

the instrument from which of two dates the interest was to be reckoned, and one date would have made the bond usurious[26] and therefore void while the other would have allowed only legal interest, the court took the latter as the date intended, although the words of the bond in their ordinary sense were more favorable to the former.

Just construction.

On the same principle a construction that is in accordance with justice should, other things being equal, be adopted rather than one that is unjust.[27]

Words taken *contra proferentem*.

352. As a rule of last resort, when other rules fail, words are to be taken *contra proferentem*, that is, in the sense least favorable to the party using them and most favorable to the other party; because a party ought so to choose his words as to make his meaning clear. Thus in a grant of land or other property the words are the words of the grantor, and are to be construed against him and in favor of the grantee, except in grants from the government, where a contrary rule prevails.[28] But if land is let and the lease contains an agreement by the tenant to pay rent, the words of that agreement are those of the tenant.

Void for uncertainty.

If after resorting to all permissible sources of information and applying proper rules of construction, no intelligible meaning can be put upon the words, or the words remain ambiguous so that it can not be made out which of two or more possible meanings or applications is the right one, the juristic act is void for uncertainty.

Modality.

353. The modality of juristic acts means "the manner and conditions under which they shall be and continue obligatory."[29] The effect of a juristic act may be made to depend upon a condition,[30] to begin upon the performance of condition precedent or to terminate upon the performance or breach of a condition subsequent or upon a conditional limita-

Conditions

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[26] See § 767.

[27] See § 16. [28] See § 600.

[29] Kaufmann's Mackeldey, § 170.

[30] It makes no difference whether we say that the condition is attached to the right or duty or to the juristic act by which the right or duty arose. Both expressions are used. See § 260.

Dies. tion. Also a time may be fixed at which the effect of the act is to begin or end, *e.g.* when a lease of land is made to commence on the first day of January next ensuing and to continue ten years. There is no special name for such a time in the common law. In the civil law it is called *dies*. A time at which the effect of the act is to begin is *dies a quo;* one at which it is to end is *dies ad quem*. A time of which it is known that it will certainly come and when it will come, *e.g.* the time of the beginning or ending of the above mentioned lease for ten years, is *dies certus;* if either or both is uncertain, *e.g.* the time when a person will die or will marry, it is *dies incertus*. *Dies incertus*, when the uncertainty is whether the time will ever come at all, is a condition.

Acts not admitting dies or condition. There are many juristic acts that do not admit of *dies* or condition, but must have their full legal effect at once and absolutely. Such is marriage or the taking possession of a thing.

Computation of time. Year. **354.** In computing time a year is a calendar year, half a year one hundred and eighty days, and a quarter of a year ninety one days, disregarding fractions of a day; and for this purpose in leap year the 28th and 29th of February are taken together as one day.

Month. A month at common law meant a lunar month, but in the ecclesiastical and mercantile laws it meant a calendar month, that is, from a given day in one month to the same day in the next or to the end of the latter month, *e.g.* from March 31st to April 30th. At present it is said that in England the word month in a deed must still be taken to mean a lunar month unless a calendar month is specified. But in mercantile transactions, and in the United States in all cases, it denotes a calendar month, computation by lunar months having gone out of use.

Day. For most purposes a day is regarded as an indivisible point of time. Thus a person has lived twenty one years when the last moment of his twenty first birthday arrives; but he is considered to be of full age on the first moment of that day, the interval between the beginning and end of the

day being disregarded.[31] But if two acts are done or two events happen on the same day, and it is necessary to show which was in fact first, this may always be done. When a person is to do an act by or on a certain day, he has as a general rule the entire day up to midnight to do it, and can not be considered in default or any action begun against him for not doing it until the next day. But in some cases by custom or for reasons of expediency a different rule prevails; for example money payable at a bank must be paid during banking hours.

Act to be done by a fixed day.

The day from which a period of time is computed is regularly excluded from the computation. Thus a year from the 1st day of January begins on the 2nd and includes the 1st of the following January.

When a period begins.

2. Agreements.

355. An agreement is a juristic act in which the intention of at least two parties must concur, *i.e.* a bilateral juristic act. This concurrent intention is called *aggregatio mentium* or meeting of minds. A contract, a sale, a gift, the appointment of an agent, the delivery of possession or payment of money by one person to another, which involves an acceptance by the latter, is or includes an agreement. The words agreement and contract are often used as synonymous; but this is incorrect, a contract being only a particular species of agreement.[32]

Agreements.

Meeting of minds.

Agreement and contract.

356. The making of an agreement begins with an offer or pollicitation made by one party to the other. The maker of the offer may fix a time within which it must be accepted; if he does not, it will remain open for a reasonable time. The maker may however revoke his offer at any time before it has been accepted, and this even

Offer.

Revocation of offer.

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[31] Because of this mode of computation the period of a year and a day often occurs in law instead of a year.

[32] The provision in the constitution of the United States, that no state shall make any law impairing the obligation of contracts, has been held to prohibit a state from taking back a gift made by it.

though he has given a time for acceptance which has not expired and has agreed not to revoke it within that time.

Manner of acceptance or rejection

The offerer may also prescribe the manner in which the offer must be accepted; but he can not prescribe the manner in which it must be rejected or put upon the offeree the burden of doing any act of rejection. If A sends goods to B with a design that B shall buy them, and writes to B informing him of the shipment and the price and adding that he shall consider them accepted unless he hears from B to the contrary, B need not take any notice of it.

When acceptance of an offer is presumed.

357. If the effect of the proposed agreement will be to confer a right upon the party to whom the offer is made without anything being required of him in return, that is, if it is a gift or in the nature of a gift to him, he is presumed to accept the offer as soon as it is communicated to him or as soon as the delivery which is necessary to perfect the gift is made, and it is not necessary for him to signify his assent in any way; although of course this presumption may be rebutted by proof that he does not accept, for a gift can not be forced upon a person against his will. Thus if A executes a deed of land to B, a bond binding himself to pay money to B or a deed of release of a debt which B owes him, and deposits it with a third person for B or sends it to B by mail, or if he deposits money in a savings bank in B's name or in his own name as trustee for B, or gives property to a third person to hold in trust for B's benefit, B's acceptance is presumed, and unless he in fact refuses to accept, the gift to him takes effect from the time that the document, the money or the property is delivered, even though he may not at that time be aware of it. But if anything is required from the offeree in return, as in a sale or in most contracts, the offer must be communicated to him and he must actually accept it before any agreement is formed.

Communication of acceptance.

But even then it is not as a general rule necessary for him to communicate his acceptance to the offerer. Thus if A sends goods to B with an offer to sell them, and B accepts and uses them; or if he offe to become responsible for the repayment of money which B shall lend to C, and

B thereupon lends the money; or if he offers to pay B a commission if B will procure persons to subscribe for the stock of a company, and B procures the subscriptions; or if he writes to B authorizing him to act as his agent in a certain matter, and B acts accordingly; in all those cases there may be a complete and binding agreement before A knows that his offer has been accepted. But when the agreement takes the form of mutual promises, for example if A offers to engage to sell and deliver to B a certain quantity of wheat at the end of six months to be paid for by B a month after delivery, so that B's acceptance involves a counter promise on his part to pay the price at the time fixed, both promises being performable in the future, the acceptance must be communicated to the offerer, and there is no complete agreement till that is done.

Implied condition of communication.

And even in some cases when a communication of the acceptance is not necessary to the formation of the agreement, the circumstances may be such that in reasonableness a condition must be understood to be implied that the acceptance shall be communicated within a reasonable time or the agreement be void. That will usually be the case where it is important that the offerer should know whether there is an agreement or not, and has no means of knowing except by being informed by the other party. Thus in the example just mentioned, if B lends money to C on A's guaranty of repayment, he ought to notify A promptly after making the loan; or if a person subscribes for shares in a new company, and shares are allotted to him, he becomes the owner of the shares, the agreement is completely formed, as soon as the allotment takes place, but he may repudiate the bargain if he is not informed of it within a reasonable time.[33]

Offer must be accepted as made

358. The acceptance must be of the precise offer made. If the party to whom it is made attempts to qualify his acceptance in any way or to change the terms of the offer, it is not an acceptance, but a counter offer, requiring to be accepted

[33] Langdell, Summary of the Law of Contracts, § 6.

in its turn; as if A offers to sell B his horse for a certain price, and B replies that he will buy if he can have a month in which to pay.

Consent to same thing.

359. To constitute an agreement the minds of the parties must meet, that is, they must have the same intention or consent to the same thing. If any mistake or misunderstanding comes in which prevents such a consent, the agreement fails. Such a mistake has been called fundamental error. This is subject to the principle already explained that when the parties express their intention in words they are presumed to have had such an intention as is manifested by their language properly interpreted. Thus if A contracts to take ice of B through the season, and B during the season sells out his business to C, who continues to supply A with ice, A not knowing of the change, there is no contract between A and C to pay for the ice delivered by C. Here the misunderstanding is as to the person of the other contracting party. It may be also as to the nature of the transaction or as to the subject matter. If a person who can not read is induced to execute a deed by a fraudulent representation that it is an instrument of a different character, it is not merely voidable for fraud but is absolutely void for lack of consent.

Fundamental error.

Subject matter of the agreement.

An agreement must have some subject matter. If the supposed subject matter does not exist, the agreement is merely illusory, and is void, because there is nothing to which it can apply. A mistake as to the existence of the subject matter comes under the head of fundamental error. This would be the case in an agreement to sell and buy a thing which, unknown to the parties, had perished and ceased to exist before the making of the agreement. But if the parties do not know whether the thing sold exists or not, as in the sale of a ship which is at sea and has not been heard from for a long time, and one party agrees to take the risk of its existence, the agreement is valid even though the thing may have perished. It is perfectly possible and lawful to buy and sell a chance.

Sale of a chance.

Pact.

360. The mutual consent or meeting of minds of the parties, formed by the offer and its acceptance, constitutes a

pact, *pactum*. Sometimes this is all that is necessary, the pact itself amounting to a binding agreement. But generally some additional element is required to be present without which the mere pact is of no force. A pact which is thus invalid standing alone is called a bare or nude pact, *nudum pactum*, and in most cases the rule of law is *ex nudo pacto non oritur actio*. The additional element needed to turn a pact into a binding agreement is usually (1) form, (2) delivery, or (3) consideration; sometimes two or all three of these.

Nudum Pactum.

Additional elements.

361. The forms required in various classes of agreements will be described in their proper places. But one very common form may be mentioned here, namely, that of a deed. A deed is a formal instrument which is required by the law or may be used at the option of the parties in many kinds of agreements. In the old common law a deed meant simply a written agreement, writing was the form which made a deed. But as in those days very few persons could write, deeds were usually drawn up by scriveners and authenticated by the seals of the parties. Sealing was then generally used in place of signing, and every person who was likely to have frequent occasion to enter into written agreements had his seal with some peculiar devise upon it, as is still the case in Japan and some other oriental countries. A deed thus came to be thought of as a sealed writing, and in later times when, through the diffusion of the art of writing, signatures generally took the place of seals and the latter fell into disuse, a distinction was made between written instruments which were sealed and those which were not sealed, a seal continued to be essential to a deed, and all unsealed writings were classed as parol, *i.e.* oral, acts.

Deeds.

A deed therefore is a writing expressing an agreement, sealed and in modern times also signed, though at common law signature was not necessary, and delivered. The rules as to signature and delivery are the same for deeds as for written instruments generally, and have already been mentioned. At common law a deed must be on paper or parchment, not on any other material. It is doubtful whether such is the law at present. A common law seal was some

Definition of deed.

Seals.

adhesive substance, usually sealingwax, affixed to the deed, upon which the seal was impressed. In those places where a common law seal is still required, a piece of paper stuck on with paste or mucilage is generally used, and it is not necessary that any thing be stamped upon it. In most of the United States, however, the word "Seal," the letters "L. S."[84] or a mere scrawl with a pen are a sufficient seal, and in some states seals are dispensed with. But this does not apply to official seals, such as the seal of a court or a notary public. For such seals some device must be stamped upon the paper or upon some adhesive substance affixed to it.

Indentures and deeds poll.

362. Deeds are divided into indentures and deeds poll. An indenture is a deed which is executed by both the party who confers the right and the party upon whom it is conferred, *e.g.* by both grantor and grantee, promissor and promisee, landlord and tenant, whereas a deed poll is executed only by the party who confers the right, who is to be bound by the agreement, *e.g.* the grantor or promissor only. When only one party confers a right and the other simply receives it, either form of deed may be used, though a deed poll is generally simpler and more convenient. But if each party confers a right upon the other, as where two pieces of property are exchanged by a single deed, or a tenant taking a lease from his landlord covenants in the deed to pay the rent, or where a partnership is formed by deed, each partner binding himself to the others by certain promises, an indenture is the proper form. Of an indenture as many copies, called parts, are usually made as there are parties, and one is given to each party; but this is not necessary. The ancient practice was for each party to execute the parts that were given to other parties, but not that one which he himself retained. Then as to each party, the part executed by him was called the original and any one not executed by him a counterpart. At present it is common for each party to execute every part, in which case the parts are all originals. The name indenture is derived from the ancient practice of writ-

Original and counterparts.

[84] The initials of the words *locus sigilli*.

ing all the parts on one piece of parchment and then cutting them apart in wavy, jagged or indented lines, so that they could be fitted together again for purposes of identification; whereas a deed poll, being in only one part, was polled or cut straight across.

Delivery to validate a pact.

363. The second of the elements sometimes required to transform a mere pact into a binding agreement is the delivery of the thing which forms the subject of the agreement. In gifts of chattels delivery is usually necessary to complete the gift, a mere consent to give and receive, standing alone, being void.

Consideration.

364. Consideration, which is in many cases essential to the validity of an agreement, is of seven sorts, namely:

Benefit conferred.

1. Some benefit or service rendered by the party upon whom a right is conferred by the agreement to the party who confers the right in payment for the right. Thus in a sale the price is the consideration for the transfer to the buyer of the ownership of the thing sold, or conversely the thing acquired by the sale is the consideration for the payment or the agreement to pay the price; in a contract for hiring services, the work is the consideration for the wages and the wages for the work.

Detriment incurred.

2. Some detriment incurred by the party upon whom the right is conferred, at the request of the other party, as where A at B's request abstains from doing some act which he has a right to do or renders some service to a third person, and B in return agrees to pay him for it; the abstinence or service is the consideration for the agreement to pay.

Marriage.

3. Marriage. If A marries a woman at B's request, that is a sufficient consideration for an agreement by B to settle property upon A or his wife or to do any other act.

Promises.

4. A promise to confer a benefit, render a service, suffer a detriment or marry is as good a consideration as doing the act would be. Thus mutual promises may be considerations for each other. If A promises B to work for him for a year or to convey land to him at a certain time and B in return promises A to pay him for so doing, the agreement consists of two promises, performable in the future, each of which is the

Mutual promises.

Executed and executory considerations.

consideration for the other. A consideration consisting of a promise is called an executory consideration; any other kind of consideration is said to be executed. But a promise to do something which the promisor is already legally bound to the promisee to do is not available as a consideration. Thus a promise by a debtor to his creditor to pay the debt according to its tenor is not a consideration for any agreement on the part of the creditor; but a promise to pay the debt before it comes due or to pay it at a particular place where the debtor is not bound to pay it, or to deliver something else than money in payment, may be a consideration. In like manner the actual doing of an act that the party is already bound to the other to do, *e.g.* the actual payment of a debt, never amounts to a consideration.

Performance of duty.

The existence of a debt or duty.

5. The existence of a debt is a sufficient consideration for an agreement by the debtor with the creditor to pay it according to its tenor, but not for any other agreement, *e.g.* not for an agreement to pay it before it falls due. The same is perhaps true of the existence of any other legal duty, but there is some doubt as to this. So far as an existing legal duty amounts to a consideration for a promise to perform it, an imperfect duty is as good as a perfect one. This is one of the ways in which an imperfect duty may sometimes be enforced. Thus if a debt has become outlawed by lapse of time, so that no action will lie to recover it, it may be revived by a new promise to pay it. But a mere moral obligation will never have the force of a consideration. Thus the father of a bastard child is under the strongest moral obligation to support the child, or the father of any child to give him a proper education according to his ability, but this moral obligation is not sufficient to support an agreement by the father to do so. The release of a perfect or imperfect legal duty, however, as distinguished from its existence, being equivalent to the payment of money and being a benefit to the releasee and a detriment to the releasor, is a consideration for any sort of an agreement.

Imperfect duties.

Moral duties.

Release of a duty.

Love and affection.

6. The love and affection supposed to exist between husband and wife or between members of the same family is

a consideration sufficient to support some agreements between them.

Certain meritorious purposes.

7. The purpose of founding or supporting a public charity, such as a church, school or hospital, of making provision for one's family or providing a fund for the payment of one's debts, is in certain cases regarded in equity, but not at law, as a consideration.

Valuable, good and meritorious considerations.

Considerations of the first five kinds above mentioned are called valuable considerations; those of the sixth class good, and those of the seventh meritorious considerations. A valuable consideration is usually said to consist of money or money's worth.

Time of the consideration

365. The consideration of an agreement must exist at the time of the agreement. If A renders services to B not expecting to be paid for them, and B afterwards agrees to pay him, the services do not constitute any consideration for the agreement.

From whom the consideration should move.

The agreement must be made with the person who furnishes the consideration or, as the technical expression is, from whom the consideration moves. If A pays money to B and in return B makes an agreement with C, there is no consideration for the agreement. But the performance of the agreement may be for another's benefit, as if B agrees with A to pay money to C. The consideration, however, need not be rendered to any party to the agreement. If A at B's request renders services or pays money to C, that is a sufficient consideration for an agreement by B with A.

Value of the consideration.

It seems that in theory the consideration, when it is a valuable one, must be equal in value to that which is given or promised in return for it. Therefore the payment of a smaller sum of money is not a sufficient consideration for a contract to pay at once and unconditionally a larger sum; or the relinquishment of an invalid claim or the transfer of a supposed right which does not really exist, *e.g.* the assignment of a void patent, is not a consideration for any agreement. But this principle is subject to an exception or qualification which in the great majority of cases makes it practically inoperative, and has caused it to

Presumption as to value.

be commonly said that any consideration is sufficient whatever its value. That exception is that in every case where the value of a thing can not be declared as matter of law the parties are allowed to put whatever valuation they please upon the things with which they deal, and when they agree to give one thing for another the law presumes that they estimate them at the same value. The value of money is a matter of legal cognizance, and a supposed right which is void, *i.e.* which is no right at all, has legally no value. But the value of all other things, rights and services is matter of opinion. Therefore practically in most cases it makes no difference what the actual value of the consideration is, provided it has, or in contemplation of law may have, any value at all, because it is conclusively presumed to have the same value as what is done or given in exchange for it. A fine estate may be sold for a song; and the payment of a small sum of money is a sufficient consideration for an agreement to pay a larger one on a condition or at a future time, the condition or the delay introducing an element of uncertainty and individual estimation into the value of the larger sum. Also a chance is regarded in law as having some value. A person may buy the fish which a fisherman shall take in the next cast of his net, and must pay the price although the net comes up empty. On the same principle the assignment of a right whose validity is disputed or the release or compromise of a doubtful claim, if the dispute or doubt is *bona fide*, may be a consideration for an agreement, although the right or claim turns out to be wholly worthless.

Value of a chance.

Compromises.

Illegality.

366. The validity of an agreement may be affected by illegality. An illegal agreement is one that involves or provides for the doing of an illegal act. For this purpose, however, certain acts which are not otherwise illegal are reckoned among illegal acts; that is, they are illegal only for the purpose of affecting the validity of agreements. The acts may be done, but no agreement is allowed to be made for the doing of them. Among these are included certain gross offences against morality and decency, such as fornication

Acts treated as illegal.

Immoral acts.

which was not a crime at common law. A contract for the hire of a prostitute is illegal. There are also many acts, agreements for the doing of which are said to be illegal as being against public policy. Thus a public officer is at liberty to pay over his salary to another person, but an agreement to do so, an assignment of his salary before he receives it, is invalid. Also it is not wrongful to induce one person to marry another, but a contract to pay a person for procuring a marriage, which is called a marriage brokage contract, can not be enforced. The same is true of a contract to pay a higher rate of interest than the law allows, though at common law there is nothing unlawful in actually paying or receiving usurious interest. Among the most important of these quasi-illegal contracts are certain contracts in restraint of trade. *Prima facie* any person has a right to engage in almost any lawful occupation, and it is for the public interest that men should not lie idle. Therefore a contract by which a person binds himself not to engage in a particular occupation is as a general rule void as being against public policy. But a contract in partial restraint of trade may be valid, if the restriction is not unreasonable. Such contracts are often made when a person sells out his business or retires from a partnership or from the service of an employer, and agrees not to carry on a business in competition with the one which he has left. The restraint must not be unlimited as to space, that is, the limits within which the party is not to carry on business must be specified, except when a person binds himself not to do business in competition with his partner or employer while the relation between them subsists; and the restriction must be no greater than in the circumstances is reasonable for the protection of the other party.

Agreements against public policy.

Assignments of salaries.

Marriage brokage contracts.

Usurious contracts.

Contracts in restraint of trade.

A bet or wager was valid at common law, and an action could be brought upon it. But it is now regarded as against public policy, and courts refuse to entertain such actions.

Wagers.

367. The illegality may be related to the agreement in either of three ways: (1) the act agreed to be done may be itself illegal, or (2) the consideration for it may consist in the doing or in a promise to do an illegal act. Such

Relation of the illegality to the agreement.

would be a contract to commit a crime or to pay a person for committing one. In these cases it makes no difference whether the parties know that the act is unlawful or not. (3) The act agreed for and the consideration may both be legal, but the agreement may be made in order to accomplish some unlawful purpose, as for example if a house is let to be used for a bawdy-house. An agreement for the purpose of defrauding creditors is of this nature; as to the creditors it is fraudulent,[35] but as between the parties it is illegal. If both parties have the unlawful intent, the agreement is illegal as to both of them; but if one is innocent, the agreement is not illegal as to him. The mere fact that one party suspects or even believes that the other is making the agreement for an unlawful purpose does not make it illegal as to the former unless he shares in the unlawful purpose.

Effect of unlawful agreements.

368. The rule as to the validity of illegal agreements is that the law will not give any assistance to a guilty party either to enforce or to rescind the agreement, but will leave him in the situation where it finds him; the practical effect of which is that the agreement is valid so far as it is executed but is unenforceable by the guilty party so far as it remains unexecuted. *Ex turpi causa non oritur actio*, and *in pari delicto potior est conditio defendentis*. Thus if A assigns his property to B in order to defraud his creditors, the transfer is valid, B becomes the owner of the property, and A can neither get the property back nor recover any price that B may have agreed to pay him for it. But where the illegality is only in the purpose for which the agreement was made and not in the act agreed for nor in the consideration, an innocent party may enforce the agreement. An exception to the above rule is found in certain cases where the agreement is made illegal for the purpose of protecting one party to it against the other; *e.g*, the laws prohibiting the taking of usury are enacted for the protection of borrowers against lenders. In those cases the parties are not regarded as being *in pari delicto*, and if the agreement has been executed the

Parties not *in pari delicto*.

[35] See § 321.

law will usually permit the less guilty party to rescind it and recover back what he has given under it. Also if the mere possession of property is transferred or money is paid, *i.e.* the possession of a fund is transferred, in pursuance of an unlawful purpose, and nothing more has been done to carry out the purpose, but the property or money remains in the hands of the original transferee, it may be recovered back from him; e.*g.* money deposited with a stakeholder on an illegal wager may be recovered before he has paid it to the winner.

Property or money deposited for an illegal purpose.

3. Contracts.

369. A contract is an agreement that takes the form of a promise; wherein a party promises that he will do or abstain from doing some act in the future; that some event other than an act of his shall or shall not happen in the future, *e.g.* that a certain ship shall arrive in port by a time fixed or that some third person shall duly pay a debt or perform a duty which he owes; or that some fact exists or has existed, as where the seller of a horse warrants him to be sound. The effect of a contract is to create a new right *in personam*;[36] wherein it differs from an assignment or conveyance, by which an existing right either *in rem* or *in personam* is transferred from one person to another, and from a release, by which a right is extinguished.

Definition of contract.

Effect of a contract.

370. Contracts are either express or implied. An express contract is one in which the promise is explicitly stated in spoken or written words, while in an implied contract it is inferred from the party's conduct. A contract may be implied in fact or in law. In the former case the parties actually intend to make a contract, but do not take the pains to put it into words; and the question of the existence of such an intent is one of fact. There is no essential difference

Express and implied contracts.

Contracts implied in fact.

[36] The word contract is also, though less properly, used to denote the duty or right created by the contract, the contract obligation, as when we speak of assigning or discharging a contract.

between such implied contracts and express ones; both are actual contracts.

Contracts implied in law.

A contract implied in law arises when from the conduct of the parties a presumption of law, and not merely of fact, is raised that they intended to make a contract; and the question of the existence of the contract is one of law. In most cases where the law implies a contract there is an actual intent to make one, the presumption of law accords with the natural inference from the facts; but this is not necessarily so, the contract may be purely fictitious. Contracts implied in law are of two sorts, those where the presumption is not absolutely conclusive and those where it is.

Presumption of a contract not absolutely conclusive.

371. In the first kind, although the presumption is not absolutely conclusive, yet it is more than merely *prima facie;* it can not be rebutted by showing simply that the parties did not intend to make any such contract, *e.g.* that they did not think about the matter at all and therefore did not intend to make any contract about it. That is the very case that the law desires to provide for. But it may be rebutted by proof that both parties actually intended not to make such a contract, *e.g.* that there was an actual agreement inconsistent with it. The law will not imply a contract where there is an actual contract covering the same ground, or force an implied contract upon the parties against the will of both of them. The presumption of a contract belongs to the class of conditionally conclusive presumptions.

No implied contract where there is an express one.

Implied terms in actual contracts.

372. When parties have made an actual contract, either express or implied in fact, the law sometimes annexes implied terms or conditions to it, on the assumption that that was what the parties really intended or would have intended if they had thought about the matter. Thus when a servant is hired there is usually an implied term in the contract that the master shall not be responsible to the servant for any injury which the latter may sustain from the negligence of his fellow servants; but the parties may if they choose agree that the master shall be responsible. So in the sale of provisions there is often an implied warranty or contract by the seller that they are wholesome or fit to eat. Some

of the most important of these implied terms are as follows.

Reasonable price or value.

When things are sold or services are rendered for pay, and there is no agreement as to the price, the law implies that a reasonable price shall be paid, as much as the things were worth, *quantum valebant*, or as much as the party rendering the services has deserved to have, *quantum meruit*.[37] If there is a customary or market price, that will be taken as the reasonable price.

Time of doing acts.

When a thing is agreed to be done and no time is fixed for doing it, it must generally be done within a reasonable time. If money is to be paid and no time of payment is appointed, it is said to be payable on demand; but this means that it is payable immediately. In this case, therefore, or even though it is expressly made payable on demand, no actual demand is necessary, but suit may be brought for the money at once without any previous demand for its payment. It is sometimes said that the bringing the action is a demand.

Quality of goods.

If there is a contract to deliver goods of a specified kind, the goods must be of a merchantable quality; they need not be of the best quality.

Manner of doing work.

A contract to perform work implies that the work shall be done in a reasonably skilful and workmanlike manner. The same principles apply here as where skill is an element in due care.[38]

Absolutely conclusive presumptions.

373. Implied contracts where the presumption of a contract is absolutely conclusive arise in three classes of cases. First, when one person renders services at the request of another, expecting payment, and the latter knows or ought to know that payment is expected, there is an implied contract by the party requesting the services to pay their reasonable value. If a man orders goods of his grocer and the latter delivers them accordingly, or if a person steps into a cab in the street and requests the driver to take him

Services rendered on request.

[37] These expressions *quantum meruit* and *quantum valebant* are also used when an obligation to pay the reasonable value of things or services arises otherwise than by contract.

[38] See § 294 *et seq.*

to a certain place, which the cabman does, a contract of this kind arises.

Voluntary acceptance of services.

374. Secondly, a like contract is implied from the voluntary acceptance of services rendered without any request but in the expectation of payment, if the acceptor knows or ought to know of that expectation. Thus if a tradesman sends goods to the house of his customer without any order but in the belief that the customer would desire him to do so, or if goods have been ordered and goods of a different kind are sent by mistake, and the customer accepts and uses the goods knowing from whence they came, he comes under an implied contract to pay for them. So if goods have been bought under a mutual misunderstanding about the price, the seller supposing he was to receive one price and the buyer that he was to pay a different price, there is no actual contract, because the minds of the parties have not met, and the buyer may return the goods. But if he has consumed or resold them, and so can not return them, he must pay their reasonable value. But if while a man is absent from home his horse falls sick, and a horse doctor comes in and treats the animal believing that the owner will pay him for his services when he returns, or if one person owns the lower part of a house and another the upper, and the latter makes repairs on the roof which are necessary for the preservation and habitability of the entire house, there is no implied contract for payment, because the owner of the horse or the lower tenant has no option whether to accept the services or not and so does not voluntarily accept them.

Quasi contracts.

375. Thirdly, in what are called *quasi* contracts. The class of obligations known in the Roman law as obligations *quasi ex contractu*[39] was created because it became apparent that in certain cases justice required that a person should be subjected to an obligation who had neither made a contract nor been guilty of a wrong. It was not assumed that the transaction out of which the obligation grew bore any resemblance to a contract; but the obligation itself, in

Obligations *quasi ex contractu.*

[39] See § 254.

whatever manner created, resembled a contract obligation in being a primary obligation, whereas obligations *ex delicto* and *quasi ex delicto* were secondary. The party had not really made a contract, but was treated as if he had. Then the transaction by which such an obligation was created came, by a natural and easy transition, to be itself called a *quasi* contract, not because it resembled a contract but because it gave rise to an obligation resembling a contract obligation. A *quasi* contract in the modern civil law is an act or transaction which is not a contract but which has the same effect as a contract in creating an obligation. This does not involve any fiction.

Quasi contracts in the civil law.

In the common law, as will be hereafter explained,[40] the same necessity arose of finding a way to subject to an obligation a person who had not in fact made a contract, but it was met in a different manner. A fiction was resorted to, and it was conclusively presumed that he had entered into a contract. The name *quasi* contract, which has been borrowed from the civil law, has, therefore, somewhat changed its meaning in its transfer to the common law; it denotes a contract which is purely fictitious. But the conception of a *quasi* contract serves the same purpose in both laws. Since the old common law procedure has been abolished in favor of a more rational system, this fiction of an implied contract has become useless, and in this book the obligations formerly treated as arising from such contracts will be discussed, together with the facts or transactions in which they really have their origin, under the subject of obligations. A single example will suffice here to illustrate their nature. When a person in any way gets possession of money which belongs to another, *e.g.* by stealing it, finding it, having it paid to him by mistake or receiving it under an agreement which is afterwards rescinded for fraud, he comes under an obligation to repay it to the owner, and is presumed to have impliedly contracted to do so.

Quasi contracts in the common law.

376. Contracts are farther divided into special and simple

Special and simple contracts.

[40] See § 927.

ontracts. The writing containing a special contract is itself called a specialty.

Special Contracts. Covenants.

Special contracts are either by deed or by record. An express promise contained in a deed is called a covenant. The verb covenant is usually employed in the deed to express the promise.

Bonds.

A bond is a deed which begins by acknowledging that the maker of the deed is indebted to the other party in a certain sum, and then goes on to declare that he binds himself, and sometimes also his heirs, to pay it; the word promise or covenant is not ordinarily used. If the bond contains nothing more, it is called a single bond. Single bonds are now rarely used, an agreement to pay money being more often put into the form of a promissory note.

Penal bonds.

A penal bond, which is the only sort of bond at present much made use of, is an instrument of a somewhat remarkable form. It begins like an ordinary single bond binding the maker to pay a sum of money, which sum is called the penalty of the bond. To this is added a clause containing a condition subsequent, that if the maker or some other person shall do or omit some act, or some event shall happen, or some fact exist, the bond shall become void. The thing really intended to be contracted for is contained in the condition; the penal sum, which constitutes the debt nominally secured by the bond, is never expected to be paid, but is inserted as a means of compelling the maker to perform the condition. No action can be brought on the bond so long as the condition is not broken; but as soon as a breach of the condition occurs the penalty becomes a debt due, and at common law in an action on the bond the entire penalty could be recovered, without regard to the value of the condition. Afterwards, however, the courts of equity interfered, and, as the technical phrase is, relieved against the breach of the condition;[41] that is, if the maker of the bond would pay to the holder of it a full compensation for the damage which he had actually suffered by the maker's failure to perform, the court of

Relief against the penalty in equity.

[41] See § 262.

equity would grant an injunction forbidding the holder to sue for the penalty. In modern times this equitable principle has been adopted in the courts of law, and the plaintiff who sues on a penal bond can recover only so much of the penalty as will fairly recompense him for his actual loss; so that at present there is really no reason for using this clumsy form of instrument instead of a direct covenant. A bond at common law was called an obligation, the maker the obligor, and the party to whom it was made the obligee. This was the usual meaning of the word obligation in the common law. A bond is the form commonly used when one person gives security for the performance of some act by another, so that the phrase "to give bonds" is often used in the sense of giving security.

Relief at law.

Obligations at common law.

Use of bonds.

377. A contract of record is either a judgment or a recognizance. The judgment of a court of law awarding a sum of money to one party against the other creates a debt. Hence, under a mistaken idea that whatever creates a debt must be a contract, the judgment is called a contract of record. This is a mere misnomer; a judgment in no way resembles a contract.

Judgments.

A recognizance is a kind of penal bond; but instead of its being made by a deed, the obligor, called here the recognitor or cognizor, comes into a court of record or goes before the clerk of the court or some public officer authorized to take recognizances, and orally acknowledges, or recognizes, himself to be bound to the obligee, who is known as the cognizee, in a certain penal sum, conditioned for the performance of some act by himself or another; and a memorandum of the transaction is made in the records of the court or in a record kept by the public officer. At the present time it is very common to write out the recognizance and file it in the court. It must be signed by the cognizor, but need not be sealed. In this case it is often in the form of a direct promise rather than of a bond, and is more commonly called an undertaking or stipulation. A recognizance can not be used for any sort of a contract at the parties' pleasure, but only on special occasions when the law authorizes it. It is

Recognizances.

Undertakings.

Use of recognizances

mostly imployed for giving security in judicial proceedings, *e.g.* where one person gives bail for the appearance of another in court or where property has been seized and is restored on security being given that it shall be forthcoming if required.

Considera-tion of spe-cialties.

378. A special contract is a formal juristic act. It requires no consideration to make it valid. In some of the United States, however, a consideration is necessary for a contract by deed, but is *prima facie* presumed to exist even though not mentioned in the instrument. Also the courts of equity, which usually pay very little attention to forms, will not enforce any contract unless it is made on a consideration.

Specialties binding on the heir.

By a specialty contract a man may bind his heir as well as himself, provided the intention to do so is expressed in the instrument; but only so far as the heir in fact inherits from the maker of the contract property, or, as it is called, assets; a person can not bind his heir to pay any thing out of his own property.

Simple contracts.

379. Simple contracts comprise all contracts, whether formal or formless, not made by specialty. At common law no simple contract was required to be in writing, for which

Parol contracts.

reason all such contracts, even though in fact written, are still called parol, *i.e.* oral, contracts.

Consideration of simple contract.

A simple contract must always have a valuable consideration; without this the promise is *nudum pactum* and is entirely void. When the consideration is executory, so

Unilateral and bilateral contracts.

that the contract consists of promises by both parties, each promise forming the consideration for the other, the contract is said to be bilateral, *e.g.* if A promises to work for B for one year and B in return promises to pay him wages at the end of each month, the performance on both sides being in the future; while if the consideration is executed at the time of the contract, in which case only one party makes a promise, it is called a unilateral contract, as in the ordinary case of a sale on credit, where the thing sold is delivered at once, and thus the seller's part of the agreement is fully performed, and the buyer promises to pay the price at some future time. The words bilateral and unilateral are here used

in a difference sense from that in which they are applied to juristic acts in general; in the latter sense all contracts are bilateral juristic acts.[42]

Failure of consideration.

380. If the consideration of a contract fails entirely, that is, if after the making of the contract it turns out that the supposed consideration did not at the time of the contract exist at all, the contract is invalid; for instance if in a sale the thing sold was not the property of the seller and the true owner afterwards reclaims it from the buyer, or if a patent right is sold which proves to be wholly void, there is no consideration for the agreement to pay the price. If money is paid on a consideration that wholly fails, it may be recovered back by the payer as a debt due from the payee to him. But a partial failure of consideration does not affect the validity of the contract, the promisor must nevertheless perform his promise, but he may have an action against the other party for compensation for what he has lost. In such a case if the promisor is sued for a breach of his promise he may, by the modern law, recoup, or deduct from the damages which he would otherwise be bound to pay, so much as he has himself been damaged by the partial failure of the consideration. But by the old law he could not recoup, but must pay in full and then resort to a cross action against the payer for the damage sustained by him.

Partial failure.

Recoupment.

4. Bailment.

381. Bailment[43] is either of chattels or of services, never of land.

Bailment of chattels.

Bailment of a chattel is an agreement under which the bailor delivers to the bailee the possession, but not the ownership, of a chattel, and confers upon him a right of possession and sometimes a right of use, and the bailee contracts with the bailor, expressly or impliedly, not to use the chattel in any other way than according to the terms of the bailment, to takes due care to keep it safe and restore it to the bailor

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[42] See § 325. [43] From French *bailler*.

at the end of the bailment, and sometimes to pay the bailor for the use of it. Or the bailor may contract with the bailee to pay him for taking care of the chattel.

Bailment of services.

Bailment of services is where the bailee undertakes to perform services for the bailor with or without pay. The transaction is called a bailment, because the bailor is, or was originally, regarded as committing, or in a certain sense delivering, a job of work to the bailee.

Bailments are divided into the following classes, whose Latin names are derived from the Roman law.

Deposit.

Deposit (*depositum*) is where the bailor, who is called the depositor, delivers to the bailee, who is called the depositary, a chattel, to be kept for the former by the latter without pay; as where a person being about to go upon a journey deposits his valuables with a friend for safe keeping.

Commodatum.

Commodatum is where a thing is lent to the bailee to be used by him gratuitously.

Mandate.

Mandate (*mandatum*) is where the bailee, or mandatary, undertakes to perform services for the bailor, or mandator, without reward; the ordinary case of friendly services.

Pawn or pledge.

Pawn or pledge (*pignus*) is where the bailor, pawner or pledgor, delivers the chattel to the bailee, pawnee or pledgee, for the latter to hold as security for the payment of a debt or the performance of some other act.[44] The chattel is itself called a pledge.

Letting and hiring.

Letting and hiring (*locatio et conductio*) covers all cases except *pignus* where the bailment is not gratuitous, where a consideration is given. It is of three kinds, namely, hiring of chattels, hiring of storage and hiring of services. In all these cases the bailor is called in Latin *locator* and the bailee *conductor*. In the first, the hiring of chattels, the bailor is also called in English the letter and the bailee the hirer. But in the last two, the hiring of storage and services, the bailor, for whom the storage is done or the services rendered, is the hirer; in other words, the subject matter of the bailment, for the purpose of fixing the English terminology,

[44] See § 551.

is taken to be, not the job of work committed to the bailee by the bailor, but the services themselves, which the bailor hires from the bailee.

Quasi bailment.

382. What are known as *quasi*-bailments are of two kinds. When the thing bailed is not to be returned *in specie* but in kind, as in the case of a loan of provisions to be consumed by the bailee or a loan of money or its deposit in a bank, it becomes the property of the bailee, and the transaction is not in the strict sense a bailment, though generally so called. A loan or deposit of money may be regarded as a bailment of a fund.[45]

Things returnable in kind.

Loan of money.

Possession without agreement.

A person is also called, though not with entire propriety, a bailee who gets possession of a chattel belonging to another without any agreement, for instance by finding or by a wrongful taking.

Warehouse receipts.

383. When goods are stored in a warehouse it is customary for the keeper of the warehouse to give to the bailor a document called a warehouse receipt, in which the warehouseman acknowledges the receipt of the goods for storage, and agrees to deliver them to the person named in the receipt or to his order on payment of the charges for storage. The holder of the receipt may indorse on it a direction to deliver the goods to another person.[46]

5. Negotiable Instruments.

Negotiable instruments.

384. Negotiable instruments are a kind of formal written contracts that were unknown to the common law and are governed for the most part by the rules of the law merchant. They derive their name from the fact that, contrary to the rule of the common law that choses in action were not assignable at all and to the rule of the modern law that when assigned they are subject to equities, these contracts are capable of being negotiated, that is assigned in such a manner as to be free from equities.[47] The most important kinds

[45] See § 219,766.

[46] The effect of this is the same as in a bill of lading. See § 844.

[47] See § 271.

of negotiable instruments are bills of exchange and promissory notes.

Bills of exchange.

385. A bill of exchange, which is also frequently called a draft, is an unconditional order in writing for the payment

Parties to a bill.

of a sum of money absolutely and at all events. The party giving the order is called the drawer, the party on whom it is drawn, who is by it directed to pay the money, the drawee, and the party to whom the money is to be paid, the payee.

Acceptance.

The bill is not binding on the drawee until he accepts it, which is regularly done by writing the word "accepted" across the face of the bill with the drawee's signature, but it may be done by the use of any words by which the drawee signifies his assent to the bill, by a separate writing or even

Liabilities of parties.

orally. After acceptance the drawee is called the acceptor, and is the party primarily liable on the bill; the drawer is bound to pay it only in case the acceptor fails to do so on due presentation and demand. If the drawee refuses to accept it,

Foreign and inland bills.

the drawer is primarily liable to pay it. A bill which is drawn and payable in the same country is called an inland or domestic bill; if drawn in one country and payable in another, it is a foreign bill. For this purpose the states of the

Sets of bills.

United States are regarded as foreign to each other. Foreign bills are usually drawn in sets of two or three; that is two or three parts or copies of the bill are drawn, each of which contains a provision that it is to be paid only if the other parts have not been paid. Then the first part presented is paid, after which the other parts become void.

Promissory notes.

A promissory note is an unconditional written promise to pay a sum of money absolutely and at all events. The

Parties to a note.

promisor is called the maker of the note, and the party to whom the promise is made, the payee. A promissory note

Express promise.

must contain an express promise to pay. A mere acknowledgement of indebtedness, such as, an "I. O. U.," though amounting to an implied promise to pay the debt, is not a promissory note.

Must not be sealed.

A bill of exchange or promissory note must not be sealed; if sealed, it is a deed, and is not negotiable.

To whom

A bill or note may be made payable to the payee only

or to his order, or to the bearer without naming any payee. In the first case it is valid between the original parties, but has not the peculiar attribute of being negotiable. In the last case it is payable to any person who becomes the owner of it. *Prima facie* any one in possession of it is the owner; and the person bound to pay is justified in paying it in good faith to any one who presents it for payment, and ought to do so unless he has notice that that person is not the true owner. bills and notes are payable.

386. Negotiable instruments, like other simple contracts, require a consideration.[48] It is usual to insert in the instrument the words "value received," to indicate that a consideration exists. But this is not necessary, because, whether those words are inserted or not, there is a *prima facie* presumption of law that the contract was made upon a valuable consideration, in which respect this class of contracts differ from simple contracts in general. A bill or note having no consideration is usually called an accommodation bill or note. Consideration. Accommodation paper.

387. A bill or note may be made payable on demand, at a specified time in the future, *e.g.* on Christmas day next, at a fixed time, *e.g.* thirty days after its date, or at a future time not fixed but certain to come, *e.g.* one month after some named person dies. If it is payable on demand, the same rule holds as in other sorts of contracts, as against the party primarily liable, that an actual demand is not necessary before suing. A bill of exchange may also be made payable at sight or at a fixed time after sight. Sight means either acceptance or protest for non-acceptance.[49] In the case of bills and notes not payable on demand three days, called days of grace, are added to the time expressed in the instrument. Thus a bill expressed to be payable thirty days after its date is actually not payable until the thirty third day. Time of payment. When demand is not necessary. Sight. Days of grace.

388. A negotiable instrument may be assigned in the Assignment of bills and notes.

[48] This is a rule of the common law which has been applied to these instruments, not of the law merchant. It is subject to exceptions in favor of a *bona fide* holder for value, as will be explained.

[49] For the meaning of protest, see § 392.

Negotiation.

Indorsement.

Special indorsement.

Allonge.

Indorsement in blank.

Negotiation by delivery.

same manner and with the same effect as any other chose in action. But by the rules of the mercantile law it is also capable of being assigned in a peculiar manner known as negotiation. If the instrument is by its terms payable to a particular person or his order or to the order of a particular person, it is negotiated by indorsement and delivery. Indorsement is either special or general. A special or full indorsement is a written direction on the back of the instrument, signed by the payee, who is then called the indorser, to pay the money to some person, called the indorsee, or to his order. The indorsee can then in turn indorse and negotiate the instrument; and there may be any number of successive indorsements. If there is not room for these on the bill or note, a slip of paper called an allonge may be annexed to it, and the indorsements written on that. A general indorsement, or indorsement in blank, is where the payee merely writes his name on the back of the instrument. It then becomes payable to bearer, but any subsequent owner may write a special indorsement above the signature. A bill or note which is payable to bearer does not need to be indorsed, but may be negotiated by mere delivery.

Holder.

Bona fide holder for value.

Negotiation free from equities.

389. The original payee, after the bill or note has been delivered to him, or any person to whom it is afterwards negotiated and who by the rules of the mercantile law is the owner of it, is called the holder; but any one in possession of it to whom it appears by its terms to be payable, or, if it is payable to bearer, any one in possession of it, is the *de facto* holder, whether his possession is lawful or not. A *bona fide* holder for value is a person to whom the instrument has been negotiated for a valuable consideration, before it was due, and who has received it in good faith supposing it to be valid and that the person who negotiated it to him had a right to do so.[50] Any holder is *prima facie* presumed to be a *bona fide* holder for value. Such a holder takes the bill or note free from equities; for instance if it was originally

[50] See § 328. A person who takes a bill or note after it is due is deemed to have constructive notice of all defences against it.

obtained by fraud, so that it was voidable in the hands of the original payee, it becomes valid when negotiated to a *bona fide* holder for value, nor can the drawer, acceptor or maker set off against the holder any claim which he may have had against the original payee or any preceding holder. The presumption that the contract originally had a sufficient consideration, which in other cases is only *prima facie*, is conclusive in favor of a *bona fide* holder for value. Moreover such a holder acquires a good title to the bill or note although the person who negotiated it to him had none. Thus if a bill or note payable to bearer is lost or stolen and the finder or thief negotiates it to a *bona fide* holder for value, the latter becomes the owner of it, in which respect negotiable instruments resemble money but differ from property in general. But an instrument which is absolutely void, not merely voidable, does not generally acquire validity by being negotiated.

Presumption of consideration.

Title of *bona fide* holder for value.

Void instrument.

If the person to whom the instrument is negotiated is not a *bona fide* holder for value, that is, if he takes it when it is over due, or if he pays nothing for it or knows at the time when he receives it of any circumstance affecting its validity, he acquires only the same rights which the person had from whom he took it, so that in his hands it may be subject to equities, if it was so in the hands of his negotiator. But when the bill or note was originally void merely for want of consideration, this defect is cured and the instrument becomes valid, if any holder of it before it comes due has paid a valuable consideration for it. Thus if A draws a bill on B payable to C, for the accommodation of C, and B accepts it for the like accommodation, neither A nor B receiving any consideration, it is invalid in C's hands, he can not maintain any action on it against either the drawer or accepter. So if C makes a gift of it to D, then D, not being a holder for value, stands in no better position than C, and can not enforce payment of it from A or B. But if D discounts it for C before it is due, it becomes valid in D's hands, even though he knew at the time when he took it that it was an accommodation bill; and it is also valid in the hands of all subsequent holders. But if C had originally procured the bill by

Negotiation subject to equities.

fraud, and D had discounted it with notice of the fraud, it could be avoided against him as well as against C.

Effect of indorsement.

390. The indorsement and delivery of a bill or note is not only an assignment, by which the existing contract right

Indorser's contract.

is transferred to the indorsee, it is also a new contract on the part of the indorser with the indorsee and with every subsequent holder, by which the indorser agrees that if the bill or note is dishonored, that is, if it is not accepted or paid by the drawer or the party primarily liable upon it on due presentation and demand, he, the indorser, if proper notice of the dishonor has been given to him, will pay it. Each indorser therefore by his indorsement becomes surety to all subsequent holders for the payment; and if the instrument is dishonored, the holder has the option to sue any party whose name appears upon it as drawer, acceptor, maker or indorser. He may sue all such parties, if he chooses, either separately, or, in most places at present by statute, jointly in one action; but he can only have one satisfaction. But he can not sue a previous holder who has not indorsed it; *i.e.* if A is the holder of a note payable to bearer and negotiates it to B without indorsing it, B can not have any

Qualified indorsement.

action on the note against A. An endorsement may however be qualified; that is, the endorser, by express words inserted in the indorsement itself, may make a different contract from the ordinary contract of endorsement, or may refuse to bind himself by any contract at all, leaving the indorsement to operate merely as an assignment of his rights in the instru-

"Without recourse."

ment. If the words "without recourse to me" or equivalent words are put in, the indorsement is effectual as a transfer, but does not amount to a contract by the indorser.

Indorsement by a stranger.

A stranger, who is not a party to or the holder of a negotiable instrument, may also indorse or "back" it. Such an indorsement is not a negotiation, because the indorser has no rights in the instrument which he can transfer. But it has nearly the same effect as a contract as though made by a party; that is, the indorser becomes surety to all subsequent holders for the due acceptance or payment of the bill or note. It is very usual for the negotiator of a bill or note payable

to bearer, and therefore not requiring indorsement, to indorse it by way of guaranty. So far as an indorsement is a contract the same rules with respect to consideration apply to it as to the principal contract contained in the instrument. The right to demand payment from a drawer or indorser who is not the party primarily liable is called a right of recourse.

Right of recourse.

391. A bill of exchange which is payable at sight and is entitled to grace, or which is payable at a certain time after sight with or without grace, must be presented to the drawee for acceptance within a reasonable time after it is issued. Such presentation is necessary in order to determine when the bill becomes payable;[51] and if it is not made in due time, the drawer and indorsers are discharged from liability. Any other bill may be presented for acceptance at any time before it is due, but need not be.

Presentment for acceptance.

If acceptance is refused, the bill is said to be dishonored by non-acceptance, and the holder may at once sue the drawer and indorsers, without waiting for the bill to come due. After a refusal by the drawee, however, any person, if the holder consents, may accept the bill "for the honor" of the drawer or of an indorser. Sometimes the drawer names in the bill or an endorser in his endorsement some person to whom the bill is to be presented if it is dishonored by the drawee. Such a person is called the drawee or referee in case of need, or simply the "case of need." It is not usual in the United States to designate a case of need.

Dishonor by non-acceptance.

Acceptance for honor.

Case of need.

When the bill or note falls due it should be presented by the holder to the drawee, accepter or maker for payment. If it is not duly presented, all the parties secondarily liable, *i.e.* the drawer and indorsers, are discharged from liability. If payment is refused, the instrument is dishonored by non-payment. It may then be paid by any one for the honor of any party to it, or presented for payment to a case of need.

Presentment for payment.

Dishonor by non-payment.

Payment for honor.

392. When a bill or note is dishonored by refusal of either acceptance or payment, the holder, if he wishes to

Duties of holder on dishonor.

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[51] See § 387.

enforce payment from the drawer or indorser, must take the following steps to preserve his right of recourse.

Presentment to case of need.

If a case, of need is named in the instrument he must present it to the case of need; but presentation to a case of need named in an endorsement is probably optional.

Protest.

If the instrument is a foreign bill of exchange, it is necessary for the holder to have it duly protested. Inland bills or notes need not be protested, but it is very common to protest them. The protest is made by a notary public, who makes a formal presentation of the instrument, and, if acceptance or payment is refused, draws up a written statement, called a protest, mentioning the fact, date and place of presentation, the refusal to accept or pay, and a declaration that the holder protests against all parties concerned for payment of the amount due and expresses. The protest is signed by the notary, sealed with his official seal and annexed to the instrument. Generally the instrument is merely noted for protest at the time of dishonor; that is the notary makes a brief memorandum upon the instrument of the date of the dishonor. The formal protest can be drawn out at any time.

Noting for protest.

Notice of dishonor.

Prompt notice of the dishonor and of the protest, when protest is necessary, must be given to all other parties who are liable on the note. Notice is usually sent by mail. If the holder does not know the address of the parties to whom notice should be given, he may enclose the notices to the person from whom he received the bill or note, with a request to him to forward them, which he is bound to do in order to retain his right of recourse against them.

When presentment or notice is dispensed with.

Presentment and notice are dispensed with in certain cases when they are imposible, *e.g.* if the person to whom presentment should be made or notice given can not be found, or when they would be nugatory and useless, *e.g.* when the drawer or indorser to whom notice would be given is really the principal debtor, as when the bill or note was made originally for his accommodation under an agreement that he should provide for its payment, and he had no reason to suppose that it would be honored.

When a bill or note is paid, it must be surrendered to the person paying; surrender and payment are concurrent conditions. Surrender on payment.

393. A check or cheque is a bill of exchange drawn by a customer on a bank and payable on demand. It is not usual to have checks accepted; but in the United States it is very common to present the check and have it 'certified" by the bank as "good" before negotiating it. This is equivalent to acceptance, and makes the bank absolutely liable to pay the check. Unless the check is certified, the bank owes no duty to the holder of it to pay it; but there is always a contract, either express or implied, between the bank and its customer that it will pay his checks if it has sufficient money of his in its hands available for that purpose, and he may have an action against the bank for improperly refusing to his pay checks. In England the practice of "crossing" checks prevails, as a precaution against fraud. Two parallel lines are drawn across the face of the check and the words "and Co." written between them. When this is done, the check will only be paid on being presented though a banker; that is, the holder of the check in order to obtain payment must deposit it in some bank. A check must be presented for payment promptly, which usually means that it must be presented or forwarded for presentation the same day that it is received by the payee or the next day. If this is not done, the drawer is discharged from liability so far as he may have been damaged by the delay, *e.g.* if the check would have been paid on prompt presentation, but during the delay the bank fails and the check is therefore not paid, the drawer can not be called upon to pay. A banker has no right to pay a check after notice of the death or bankruptcy of the drawer.

Checks.

Certifying checks.

Duty of bank to pay checks.

Crossing checks.

Presentment for payment.

Death or bankruptcy of drawer.

394. Bank bills and other kinds of paper money are promissory notes payable on demand. Bank bills.

Bonds or debentures issued by governments or corporations for the purpose of borrowing money, if not under seal, are promissory notes, and if made payable to order or bearer are negotiable. If they are sealed, they are properly deeds, and would not regularly come under the rules of the law Debentures.

Seal.

merchant as negotiable instruments. But by custom they are at present treated as negotiable, if expressed to be so, and probably that custom has now acquired the face of law. The interest on such bonds is usually payable at fixed times by instalments, for example semi-annually, and a small writing called a coupon for each separate instalment of interest is attached to the bond, which is to be detached and presented for payment when that instalment falls due. If a coupon contains an express promise to pay, it is a promissory note, and may after being detached from the bond be separately negotiated.

Coupons.

6. Suretyship or Guaranty.

Surety.

395. A surety is a person who by agreement becomes responsible for a debt of another or for the performance by another of some act; as if A agrees with B that, if B will lend money to C or sell goods to C on credit, A will be responsible to B for the payment, or if C is arrested and A gives bail that C will appear in court and stand trial. The person for whom security is given is called the principal.

Liability of surety.

Suretyship implies a personal liability on the part of the surety. If A mortgages his property to secure B's debt but does not become personally responsible for the debt, he is not a surety. A surety may become unconditionally and primarily liable to the creditor for the debt, so that the creditor can treat him as the principal debtor and sue him at once for the debt without first resorting to the actual principal, or he may bind himself only secondarily and conditionally, so that the creditor must first endeavor to get his pay from the principal before calling upon the surety to pay. The latter sort of suretyship is often called guaranty.[52] Thus if C lends money to B and A becomes surety, a very common form is for A and B to make a joint bond or joint promissory note to C, on which they are both primary debtors as to C, though as

Guaranty.

[52] The word guarantee is often improperly used for guaranty. Guarantee means the creditor to whom the guaranty is given. The verb is also properly guaranty, not guarantee.

between themselves they are principal and surety. But if A draws a bill of exchange on B in C's favor and B accepts the bill, B is the primary debtor and A stands as a mere guarantor, who can not be sued until the bill has been duly presented to B for payment and dishonored.

Statute of frauds.

By the statute of frauds a contract of suretyship, being an "agreement to answer for the debt, default or miscarriage of another," requires writing.

The contract is *uberrima fide*.

The contract of suretyship is *uberrima fide*, and is vitiated by any wilful and material concealment or false representation on the part of the creditor to whom surety is given, even without actual fraud.[53]

Discharge of surety.

The surety is also discharged if without his consent the creditor makes any agreement with the principal debtor whereby the obligation between them is varied or the time of payment extended, or if any thing is done by the creditor by reason of which the surety is more likely to be called upon to pay or is deprived of any remedy which he would have had for his reimbursement in case he has to pay. The contract is strictly construed in the surety's favor, and he shall not be placed under any greater or different responsibility or exposed to any greater danger of loss than he originally agreed to assume. But mere omission by the creditor to enforce payment of the debt from the principal when it comes due, if there is no actual agreement on his part not to enforce it, does not discharge the surety, because he is not injured by it. He may protect himself by paying the debt and then resorting to any remedies that he may have for his reimbursement.

Delay in suing principal.

Contribution among co-sureties.

396. If there is more than one surety, the creditor may enforce payment from any one that he pleases. But as between the sureties themselves they ought, in the absence of any contrary agreement, to pay in equal parts, and if one pays more than his share, he may call upon the others for contribution. Any surety who pays the debt or any part of it is also entitled to be reimbursed by the principal.

Reimbursement from principal.

If the creditor has any other security for the debt, for

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[53] See § 314,316.

Subrogation of surety.

instance a mortgage on the principal debtor's property, the surety upon payment is, in equity, subrogated, as the expression is, into the place of the creditor, and may enforce the security for his own benefit to obtain reimbursement. The creditor in such a case is looked upon in equity as holding the security in trust for the surety. And conversely if the principal has given security to the surety for his indemnification, the creditor is sometimes entitled to the benefit of that security; but on this point the law is not yet settled and the decisions in different places conflict somewhat.

Creditor's rights in surety's securities.

7. Insurance.

Insurance.

397. Insurance or assurance is a contract whereby one party, called the insurer, assurer or underwriter, agrees to pay to the other party, called the insured or assured, a sum of money for his indemnity in case the assured is subjected to a certain loss or damage, for instance if his ship is wrecked, his house is destroyed or injured by fire or his goods are stolen. In life insurance the payment is to be made on the death of the insured, or at the expiration of a certain time after the making of the contract if the insured lives so long, to some person designated by the insured, for instance his wife or some relative.

What may be insured against.

Any sort of a loss may be insured against, provided its happening or the time of its happening is uncertain. The most ancient kind of insurance is marine insurance, which is the insurance of ships and property at sea against various dangers, such as fire, capture and the "perils of the sea." Marine insurance originally fell under the cognizance of the maritime law. But in England the common law courts have assumed jurisdiction of insurance contracts and excluded the court of admiralty.[54] In the United States a suit on such a contract may be brought in either kind of court. The other sorts of insurance are modern. The most important kinds are fire and life insurance, but various other casualties are

Marine insurance.

The maritime and the common law.

Modern kinds of insurance.

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[54] See § 962.

frequently insured, against, such as accidents, cyclones, theft, fraud, sickness and death of animals or the bursting of steam boilers.

The underwriters.

In former times, and not unfrequently at present in marine insurance, the underwriters were individual merchants, each of whom subscribed or underwrote the contract, placing opposite his name the amount for which he consented to become liable.

Lloyd's.

Marine underwriters used to meet at a coffee house in London kept by a man named Lloyd, and in course of time they formed themselves into an association, now known by the name of Lloyd's, which collects for its members information about ships and performs various other functions.

Lloyd's rating.

It keeps a list of ships with a rating or classification of them according to their condition. The rating is indicated by letters for the hull and figures for the rigging *etc.* Thus "A 1" signifies that both the hull and rigging are in first rate condition.

Mutual insurance.

At present, however, underwriters are generally insurance companies. A mutual insurance company is one where the company is itself composed of the persons who are insured in it, and the profits and losses of the business are divided among them; that is, practically the members insure each other. This is now the most common plan of life insurance.

Insurable interest.

398. The insured must have what is called an insurable interest in the subject insured. A person is not allowed to insure another's property in which he has no interest. Such a contract is a mere bet, is called a wager contract, and is entirely void. An insurable interest does not necessarily mean a property right; a person may have an insurable interest in property which belongs to another. But it implies that he has some pecuniary interest in the safety of the property insured or may be subjected to a pecuniary loss by the happening of the event insured against.

Insurable interest in lives.

It was for some time doubted whether a contract of life insurance was valid, partly, as it seems, from the notion that it was in effect a bet on the time of one's own death and was impious. But it is now settled that a person has an insurable interest in his own life, and may have in the life of another, as for instance a wife in her husband's life or a creditor in his debtor's.

The form of the contract.

399. The contract of insurance need not be in writing, except that in England writing is required by statute in marine insurance. But writing is generally used. A written

The policy.

contract of insurance is called a policy.[55] A warranty in a

Warranties.

policy is a term or stipulation, which (1) excepts certain losses from the policy, or (2) amounts to a condition precedent. Thus a warranty that goods are free from average[56] under five per cent means that the underwriter will not pay for damage to the goods amounting to less than five per cent of their value; a warranty that a ship is seaworthy or that the inner partitions of a house are of brick means that unless the warranty is complied with the underwriter shall not be liable at all, *i.e.* is a condition. These meanings of the word warranty are peculiar to insurance contracts.[57]

Representations and concealments.

Also the contract of insurance is one of those that are said to be *uberrima fide*, so that any material false representation made by the insured to the underwriter to induce him to enter into the contract, or even any concealment from the underwriter of any material fact known to the insured, such, for instance, as that a ship on which a policy of insurance is asked for has sailed in an unseaworthy condition, though not fraudulent,[58] has the same effect as fraud in making the contract voidable.

The application or slip.

400. Usually a person desiring to be insured presents to the underwriter a written application for insurance, known in England in the case of marine insurance as a "slip." This commonly contains various representations or statements by the insured relating to the subject matter of the insurance, which are often referred to in the policy and thus incorporated into the contract, in which they become in most cases conditions precedent, so that if they are not true the contract is void.

The premium.

401. The price paid to the underwriter for assuming the risk is called the premium. In life insurance it is usually paid in annual or semi-annual instalments. Sometimes pro-

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[55] From Italian *polizza*. [56] See § 404.
[57] See § 613. [58] See § 314, 316.

missory notes, called premium notes, are given for the whole or a part of the premium, and in case of a loss the amount of the unpaid notes with interest is deducted from what the underwriter has to pay. Premium notes

402. A valued policy is one in which the value of the property or interest insured is stated. An open policy is one in which it is not stated but left to be proved in case of loss. A floating policy is a policy in which the specific goods insured are not designated, which is intended to cover all the goods that may be in a certain place or situation during the life of the policy, as if a merchant insures all the goods that he may have in his warehouse during a year, the goods changing from time to time. Valued policy. Open policy. Floating policy.

403. The sum named in the policy as the sum which the underwriter can be called upon to pay in case of loss is called the sum insured. It need not be the same as the value of the property insured or of the assured's interest. If it exceeds that value, the insurance is called over-insurance. A very common species of fraud is to over insure property and then intentionally cause its destruction, for which reason underwriters usually refuse to insure property to its full value. The sum insured. Over-insurance.

Reinsurance is where an underwriter insures himself with another underwriter against loss. It often happens that an underwriter, not liking a risk that he has assumed or thinking it too large, seeks to protect himself against loss by reinsuring the whole or a part of it. Reinsurance.

Double insurance is where there are two or more separate insurances upon the same interest. In case of a loss the insured can recover no more than the actual loss which he has suffered. Generally he may demand compensation at his option from any one or more of the underwriters; but as between themselves the different underwriters should bear the loss proportionally to the amounts which they have insured, and if any one of them is compelled to pay to the insured more than his share he is entitled to contribution from the others. But sometimes the policies provide that the first underwriter shall be first called upon, then the second, Double insurance. Liability of different underwriters.

and soon till the whole amount of the loss is paid. Then if any of the later underwriters have not been called upon, they must refund the premiums received by them. This provision is so often inserted in American marine policies that it is known as the American rule.

The American rule.

Total loss.

404. A loss for which the underwriter has to pay may be either a total or a partial loss. A total loss is the entire destruction or irretrievable loss of the thing insured. In this case the underwriter must pay the value of the thing, not exceeding the sum insured. In marine insurance when the thing has been put into such a situation that, although it is not actually lost, its loss is extremely probable, for example, if a ship is sunk but may possibly be raised and saved, the assured is generally permitted to treat this as a constructive total loss, abandon the property to the underwriter, and receive from him the full amount insured. Any thing so abandoned, or anything that may in fact be saved from a total loss, whether an actual or constructive total loss, for instance materials saved from a wrecked vessel, is called salvage,[59] and belongs to the underwriter. The underwriter is said to be subrogated into the rights which the assured had in the salvage.

Constructive total loss.

Abandonment.

Salvage.

Partial loss.

General average.

A partial loss is also called an average loss.[60] Average is general or special. The former is where some part of the ship or cargo is voluntarily sacrificed in case of necessity to save the whole adventure from total loss, or sometimes where money is expended for the same purpose. Thus the jettison, or throwing overboard, of a part of the cargo or the cutting away a mast in a storm to lighten the ship, or in special circumstances money paid for temporary repairs which are necessary for the safety of the ship but are of no permanent benefit to her, are general average losses; but not the loss of spars that are carried away by a gale or injuries received in beating off an enemy, since these are not voluntarily incurred.

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[59] For another meaning of the word salvage see § 831.

[60] The etymology and origin of the word average are uncertain and have been the subject of much controversy.

General average losses are to be contributed for by the owners of the whole adventure, including the owners of the property which is sacrificed. Since the sacrifice was for the benefit of all, it is right that all should share it. But each of these may in turn reclaim from his underwriter what he has paid. Contribution for general average.

Particular average is any other loss or damage not total happening to the thing insured by the perils insured against, as where a ship is damaged by a storm but not lost, or a house insured against fire is partly burned. Here the underwriter must reimburse the insured for his actual loss, or in marine insurance pay the same proportion of the sum insured as the loss bears to the value of the property. Particular average.

405. The loss, in order that the underwriter may be responsible for it, must be the proximate consequence of the peril insured against. For example, if property is insured against fire, the fire must be the proximate not merely the remote cause of the damage. The meaning of proximate in this connection has been already explained.[61] Proximate cause of loss.

8. Delivery and Tender.

406. Delivery is a bilateral act whereby the possession of a thing is transferred from one person to another Both parties must consent; the deliverer must intend to renounce the possession of the thing and the deliveree to acquire it. Delivery.

Where the deliverer has not actual possession or at least has not manual prehension of the thing, and the deliveree already has such power over it as would be requisite for actual possession or can immediately take actual possession, delivery can be made by mere words. Thus a person may in this manner make a gift of a thing to his servant, who already has the custody of it, and put him into possession. Or if logs are lying in a river, the owner standing on the bank may deliver them to another person. Where goods are enclosed in a place, as for instance if they are stored in When deliverer has not possession. Symbolical delivery.

[61] See § 240.

a warehouse or locked up in a box, delivery may be made by giving the deliveree something which will give him the control of the place, such as the key of the warehouse or of the box. This is called symbolical delivery.

Attornment. If the thing is in the possession of a third person, it is a sufficient delivery if that person attorns to the deliveree, that is, acknowledges his right and consents to hold for him, as if A should make a gift to B of a chattel which he had lent to C, and C should assent and agree to restore it to B.

Tender. **407.** Tender is an attempt to make delivery; it is a unilateral act. A mere verbal offer to deliver is not enough, the thing tendered must be produced and put where the other party may, if he pleases, at once take actual possession. Thus it is not a tender of money due for the debtor, having the money in his pocket, verbally to offer to pay it; he must actually place it within the creditor's reach. But if the party making the tender has the thing with him and is ready to produce it, but the other before he can do so positively refuses to accept it, he need not go through the empty form of making any farther proffer, but the tender is complete.

CHAPTER XXIII.

RESPONSIBILITY FOR OTHERS' CONDUCT.

Grounds of responsibility.

408. One person may be held responsible for another's conduct on any of three grounds, namely:

Natural consequences of conduct.

(1) That the conduct of the latter is the natural and proximate consequence of some act or omission of the former, for which he should be held answerable as for any other consequence of his acts or omissions. Thus where the defendant went up in a balloon and came down into the plaintiff's garden, which caused a crowd of people to collect, who broke down the garden fence and trampled upon and injured the garden, it was decided that the defendant was responsible for the damage done by the crowd, because its collection there was the natural and proximate consequence of his act.

Delegation of performance of a duty.

409. (2) When a person is under a duty to do acts to accomplish a certain result, and he entrusts or delegates the doing of them to another, he is responsible for the omission of the latter to do the required acts, but not for any unlawful act which the latter may commit. It makes no difference whether the person employed to perform the acts is the servant or agent of the employer or not; under this principle a person may be held liable for the default of an independent contractor, though in general one who hires a contractor to do work is not responsible for the contractor's wrongful conduct. Thus if a water company has obtained promission to lay pipes in the street of a city and to make excavations in the street for that purpose, and lets the job out to contractor whose regular business it is to do such work and who is not the servant of the company, the act of the contractor in making the necessary excavations, which is a lawful act, is imputed to the company and deemed to be the act of the company under a principle presently to be explained.[1] The company therefore,

Independent contractor.

[1] See § 410.

having made an opening in the street which will be dangerous to travellers unless properly guarded, comes under a duty[2] to take reasonable precautions for the safety of persons in the street, which is a duty to do acts. The performance of this duty the company delegates to the contractor. If therefore the contractor omits to take proper precautions, if for instance he fails to light or in any way guard the excavation at night and some one in consequence thereof falls in and is injured, the company is responsible. The duty to do what it necessary rests upon it, and it can not get rid of that duty by employing some one else to perform it. But if the contractor in making the excavation had found it necessary to blast out rock, and had negligently put in too large a charge of powder or negligently fired a blast at a time when the street was full of people, and had by that means hurt some one, the company would not be answerable for that wrongful act of the contractor. So if A is indebted to B and sends the money to pay the debt by C, and C embezzles or accidentally loses it, so that the debt is not paid when due, A is liable for the non-payment, whether C was his servant or not.

Non-payment of debts.

Imputation.

410. (3) One person may be held responsible for another's conduct on the ground that the latter represents the former, acts in his stead, so that his conduct is to be imputed to the former as if done by him in person: *qui facit per alium facit per se.* Of course this theory of representation or imputation expresses only the formal legal ground of holding the former person responsible. The real reasons for doing so are reasons expediency or justice, which need not be the same in all cases.

Cases of imputation.

The imputation of conduct takes place in two classes of cases: first, where it is not based on any special relation existing between the parties, and secondly, where it is based on such a relation.

Acts commanded or procured.

In the first place, if one person commands, requests actively assists or intentionally procures another to do an act,

[2] The duty stated in § 695.

the act in most cases is imputed to the former, and he is responsible for it as if he had done it himself; though this does not prevent the actual doer from being also responsible. Thus a man who employs another to commit a crime is himself guilty of the crime; and a woman on this principle has been convicted of the crime of rape,[3] which it was physically impossible for her to commit in person, but of which she made herself guilty by aiding and inciting the man who was the actual perpetrator.

What acts are deemed to be commanded.

If a person is employed to accomplish a certain result or to do a certain work, he is deemed to be employed to do whatever acts are necessary to its accomplishment, and those acts are imputed to the employer. But this only applies to such acts as are reasonably necessary, not to such as are merely convenient; and if there is a choice of means for attaining the end, the employer is not deemed to have authorized the use of any particular means. Therefore if the thing can be done in two ways, one of which is perfectly lawful and the other involves the doing of unlawful acts, and the person employed chooses the latter way, the employer is not responsible, under this principle, for the unlawful acts. Thus in the illustration given in § 409 of a contractor employed by a water company to lay pipes in a street, it was impossible to lay the pipes without excavating for them, so that the act of making the excavation was imputed to the company as its act. But it was possible to make the excavation carefully and in a proper manner, and therefore any negligent acts done by the contractor in the course of the work should not be deemed the acts of the company.

Acts which a person could have prevented.

A person however is not considered to have commanded, requested or procured the doing of an act merely because he could have prevented it but did not, and this although its prevention would have cost him no trouble or expense, and he refused to interfere for no reason but because he desired to have the act done. No doubt a person may stand by and see a crime committed and make no effort to prevent it, even though

[3] See § 1218.

he knows that the perpetrator would desist on his mere request, without incurring any legal liability for the crime, provided his conduct is strictly confined to mere abstentation from acting.

Presence at the doing of unlawful acts.

But to be present at the doing of an unlawful act and encourage and incite the actual actors, or even to be present for the sake of giving them countenance and moral support, without actually saying or doing any thing, will involve participation in the wrong.

Act which the commander might lawfully do.

411. A person can not be held responsible as for a wrong on the ground of imputation, though he sometimes may on other grounds, for procuring the doing of an act which would not be wrongful if done by him personally. For instance if A persuades B to do some act which he has agreed with C not to do, and thus to break his contract with C, A can not be deemed to have committed any wrong against C on the theory that the act is his act; as his act it is lawful, since he is not bound by the contract. For this reason it is very seldom that the principle of imputation can be applied when one person procures another to forbear from doing an act.

Imputation on the ground of special relations.

412. Secondly, the existence of some special relation, such as that of husband and wife, master and servant or principal and agent, between two persons will often furnish a ground for imputing the conduct of one to the other and holding such other responsible for it. A man for instance may sometimes be responsible for his servant's wrongdoing, though it was done without his procurement or consent or even against his express commands. The special relations out of which responsibility may grow will be discussed elsewhere.

SUBDIVISION II. RIGHTS AND DUTIES.

A. RIGHTS *IN REM.*

CHAPTER XXIV.

RIGHTS *IN REM* IN GENERAL.

Definitions of rights.

413. In order to define any specific right *in rem* it is necessary to describe the state of fact which forms its content, which the law seeks to protect by creating the right. This is often most conveniently done in an indirect manner, by pointing out the ways in which that state of fact can be impaired and the right violated. Therefore we often speak of a right as a right not to have a certain condition of things brought about, or that certain acts shall not be done, *e.g.* a right not to be beaten, slandered, deprived of one's property or subjected to pecuniary loss, as if the act were the subject matter of the right. This is a convenient form of expression; but the reader, to avoid being misled by it, should carefully bear in mind that the real content of the right is not the act but the condition of fact that will or may be impaired by doing or omitting the act. Thus the right not to be beaten is a short expression for the right in that condition of a person's body which will be impaired by his being beaten, or the right not to be deprived of one's property means the right in that condition of fact which constitutes possession of the property. Also it may be well to repeat here what has already been said, that a violation of a right is not necessarily wrongful; it is only so when it is caused by some act or omission which amounts to a breach of some duty corresponding to the right; so that whenever in the following discussion of rights any act or omission is spoken of as amounting to or causing a violation of a right and being on that account wrongful, it is tacitly assumed that the circumstances are such that the act or omission is a breach of duty.

Rights to acts.

Violations of rights not necessarily wrongful.

CHAPTER XXV.

PERSONAL SECURITY.

Subdivisions of the right.

414. The right of personal security can be divided into the following sub-rights, namely, the rights of (1) bodily security, (2) mental security, (3) liberty and (4) reputation.

1. Bodily Security.

Right to life.

415. This is a right in the condition of one's own body. The most important bodily condition to a person is that of being alive. It is generally said therefore that a right to life forms a part of the right of bodily security. But at common law the killing of a human being was not a civil injury. No person could bring any civil action for it. It follows therefore that at common law no such right as a perfect right to life existed. If, however, any interval elapsed between the infliction of the injury which caused death and the death itself, the injured party had during that interval a right to sue for the injury; there was a violation of his right of bodily security.

Interval between injury and death.

Lord Campbell's act.

416. In 1846 a statute, known as Lord Campbell's act, was passed in England, which provided that whenever the death of a person was caused by a wrongful act, neglect or default, such as would have given a right of action to the party injured if he had not died, his personal representative might maintain an action to recover damages for his death for the benefit of the husband, wife, parent or child of the person killed. At present the action may be brought directly by the beneficiary. Very similar statutes have been enacted in the United States. All these statutes require that the death be caused by some wrongful act or omission, *i.e.* some act or omission which is wrongful, which amounts to a breach of duty, independently of the statute. That is, these statutes do not create any new duties, but rather new rights. No

Effect of these statutes.

attempt seems to have been made in drafting them to indicate their theoretical basis or their place in the legal system, which is much to be regretted, because the omission has given rise to a good deal of conflict and confusion in the decisions. The statutes may, however, be divided into two groups.

The first group of statutes.

417. The first group merely continue the right of action which the deceased would have had if he had recovered from the injury instead of dying. It is considered that the right of action originally belonged to him and is based upon a violation of his right of personal security; and on his death, instead of being extinguished, it passes to the person appointed by the law to sue. The statutes belonging to this group, therefore, must be regarded as enlarging the right of bodily security by adding to it a right to life.

The nature of the right.

Contributory negligence.

Since the injury is to the deceased person's right, it follows that any negligence or wrongful conduct on his part by which he contributed to the injury, which had he lived and brought the suit in person would have been a good defence against him, will also be available as a defence in an action by his personal representative under the statute, unless the statute itself provides otherwise. For example, if a person negligently attempts to cross a street close in front of a rapidly approaching carriage, and the driver of the carriage negligently drives over him and injures him, he can not recover any damages for the injury sustained, because his own negligence contributed to bring it about; so if he is killed, his personal representative can not recover any thing. It has been held, too, in some of the United States, that if death was caused instantaneously by the injury, no action would lie under the statute, because there was no time during the life of the party killed when he himself had any right of action, and therefore none could pass from him to his personal representative. Whether this be logically and technically correct or not, such a rigid construction of the statute defeats its obvious purpose, and has not been generally adopted; in most places the action can be maintained though death was instantaneous.

Instantaneous death.

The second group of statutes.

418. The statutes of the second group do not operate

to make any right of action survive, but give a new right of action, distinct from any that the deceased person had, either directly to some member of his family or to his personal representative as a sort of trustee for the family. The action is not based on a violation of any right of the person killed, but on some sort of a right which his family are deemed to have had in him. These statutes therefore do not enlarge the right of bodily security or create any right in a person as to his own life, but create rights analogous to those which a husband has in his wife or a father in his child, which will be discussed hereafter.

The nature of the right.

Instantaneous death.

Contributory negligence.

It makes no difference therefore whether death was instantaneous or not. Perhaps logically the contributory wrong or negligence of the person killed ought not, under this class of statutes, to furnish any defence to the action; but it is held to be a defence, unless the statute says that it shall not be.

Pecuniary damage.

419. In most places the rule prevails, to whichever group the statute belongs, that there is no right of action under it unless the death has caused an actual pecuniary loss to the persons for whose benefit the action is brought, which loss must be proved. In other places it is considered that the death itself is a violation of right sufficient to support the action and give a right to at least nominal damages, if no actual pecuniary loss is proved. In some places the maximum or the minimum amount of damages that can be awarded is fixed by statute.

Mental suffering.

Mental suffering on the part of the person for whose benefit the action is brought is not a violation of this right; *e.g.* if a man sues for damages for killing his wife or child, mental anguish caused to him by his bereavement can not be taken into account under the present principle in estimating the *quantum* of damages, but only his pecuniary loss.

Bodily security in general.

420. Apart from any right to life, the right of bodily security falls into two subdivisions, that is, there are two conditions of a person's body which the law protects. First,

Freedom from interference.

a person has a right that his body shall not be physically interfered with at all. Any physical contact between the body

and anything else is a violation of this right. Therefore a person's right is violated not only by beating, wounding or maiming him, but by striking him so gently as not to hurt him at all, pushing or jostling him, throwing water upon him, spitting upon him or touching him. And in this respect the right of bodily security is extended somewhat, so as to cover not merely the body itself but things closely connected with it. A violation of the right may be committed by tearing a person's clothes, knocking off his hat or striking his walking-strick which he is carrying in his hand or the horse which he is riding, even though his body itself is not touched. But mere contact with the body of such impalpable things as noises, smoke or smells does not violate this right.

Things connected with the person.

Contact of impalpable things.

The second subdivision of the right of bodily security is a right in the unimpaired condition of one's body. Any change for the worse in this, *e.g.* pain, sickness, weakness, mutilation, disfigurement, is a violation of this right, whether caused by physical contact or not; but not mere temporary annoyance, as distinguished from actual injury, caused by contact with such impalpable things as above mentioned.

Unimpaired physical condition.

2. Mental Security.

421. The first right of mental security is a right not to be put under reasonable apprehension that an immediate attack involving a violation of bodily security is about to be made upon one. "A man has a right to live in society without being put in fear of personal harm." An attempt or apparent attempt to commit an immediate personal injury, in such circumstances as to create a reasonable apprehension that the attempt will be successful, causes a violation of this right; *e.g.* shaking the fist in a person's face and threatening to strike him, pointing a loaded gun at a person within shooting distance and threatening to shoot, or even an unloaded gun if the person threatened does not know that it is not loaded, chasing a woman and calling upon her to stop with

Freedom from apprehension.

an apparent intention to commit a rape upon her. Probably acts involving direct interference with the body in an insulting or contumelious manner would also violate this right, even though not amounting to or threatening a violation of the right of bodily security, such as blowing tobacco smoke into a person's face or holding a vile smelling thing under his nose.

Insulting interferences with the person.

Mere words, however insulting or menacing, do not by themselves amount to a violation of this right; for example to stop a person on the street and assail him with vile or opprobrious epithets, or to call out to a person at a distance threatening to beat him or to do him some injury. But words used at the time of doing an act may characterize the act and show whether or not it is a violation of this right. Thus where the defendant, taking offence at some remark of the plaintiff, advanced toward him, laid his hand upon his sword, and said: "If it were not assize time, I would not take such words from you," it was decided that no violation of this right had taken place. The words showed that no present violence was actually intended.

Mere words not a violation of right.

Words characterising an act.

422. Secondly, when an injury is committed upon a person, and is accompanied with circumstances of insult, contumely or sometimes mental suffering, the injured party in an action for the wrong may also recover damages for the outrage to his feelings. For example if the conductor of a railroad train wrongfully expels a passenger, this is in itself a wrong. But if besides he calls him vile names, additional damages may be awarded for that. This points to the existence of a right of mental security which is violated in such cases. This right, however, does not exist as an independent right, but only as accessory to other rights; that is, mere insult alone, unaccompanied by any other violation of right, will not support an action.

The accessory right of mental security.

423. Thirdly, there perhaps exists a right of privacy, which would fall under the head of mental security. Actions have been sustained in a few cases for indecent violations of privacy, *e.g.* where a man intruded himself into a woman's bed room while she was in a state of partial nudity. In

Privacy.

Indecent violations of privacy.

that case it did not appear that the woman had any property right in or possession of the room, in fact the possession was probably in her husband, so that no property right of hers was violated; but the injury was regarded as a personal wrong to her.

Privacy generally.

When the element of indecency is absent, there can not at present be positively affirmed to be any right of privacy recognized at law. That is, there is no authority for holding, for example, that it is a violation of any legal right to photograph a person without his consent and sell the photographs, or for a newspaper to print an account of a person's private affairs in which the public have no legitimate interest. But the courts of equity have in a number of instances granted injunctions against doing acts on the ground, or partly on the ground, that they would be unwarrantable invasions of privacy. In New York an actress, who had been surreptitiously photographed while performing in "tights," obtained an injunction forbidding the sale of the pictures.

Privacy protected in equity.

No general right of mental security.

424. Except the somewhat limited rights above mentioned, there is no right of mental security. That is, there is no general right to be protected against mental pain and suffering, insult or humiliation, wounded affections, fright or anxiety or other disageerable states of consciousness. Thus if by a defect in a highway an accident happens by which a person receives a bodily injury, damages may also be recovered for mental suffering; but not if he is merely frightened without being hurt. So it has been held that no action lay for making noises whereby a person was disturbed in his devotions and religious meditations in church, on the ground that no right of his was violated.[1]

3. Liberty.

Imprisonment.

425. The violation of the right of liberty is called imprisonment. This is effected by depriving a person of his liberty by force, threats or authority. It includes not only confinement in a prison or jail, but in a house or room or

[1] See § 436.

in any place or enclosure whatever. Even confinement in an enclosure is not necessary; to seize a person in the street and detain him by force is an imprisonment. Nor is any actual physical force essential. A person may be imprisoned if he submits from fear or a sense of duty to the authority, commands or threats of another. Thus an officer may arrest a person without touching him. If the person submits to the authority of the officer and goes with him, he is imprisoned as soon as the arrest is made, and before being locked up. However, a person is not imprisoned because he is prevented from going in some particular direction only. It is not imprisonment to prevent a person from passing out of an enclosure by one gate, if he may go out by another.

Physical force not essential.

Free passage in one direction.

4. Reputation.

Meaning of reputation.

426. A person's reputation is the good opinion which others have of him, not his own character or feelings. Therefore mental distress caused to a person by the circulation of false reports about him is not a violation of this right, and can not alone be recovered for in an action for circulating such reports. The right of reputation is violated by the publication about a person of certain kinds of false and derogatory statements, which if made orally are called slanders, if in writing, print or other permanent form, libels. The essentials of a slander or libel are as follows.

Slander and libel.

Publication.

427. The statement must be published. Publication means communicating it to some person other than the one to whom it refers; to a single other person is enough. But it is not a publication to abuse a person to his face, if no one else is present, or to send him a libellous letter, if no one reads it but himself. If, however, a third person is standing by and hears what is said, or if the letter is opened and read by the clerk or secretary of the person to whom it is addressed, there is a publication.

Falsity.

428. The matter published must be false. It is not a violation of a person's right of reputation to publish any statement about him that is true, no matter how derogatory

or injurious it may be to him.[2] It must also be derogatory; otherwise it does not impair the person's reputation or violate his right, notwithstanding it in fact causes him annoyance or damage. For example it would not be slanderous to say falsely of a mechanic that he was member of a trade union, even though he were refused employment in consequence. The publication must be derogatory.

429. Some kinds of false and derogatory publications about a person are conclusively presumed to injure his reputation; and therefore they amount to a violation of his right, whether they cause him any actual damage or not. These are said to be slanderous, libellous or actionable *per se*. Other kinds are presumed not to injure the party's reputation, and therefore they do not violate his right, unless they cause him some actual pecuniary damage, which is called special damage. Statements actionable *per se*. Special damage.

430. The following four kinds of false and derogatory publications about a person, whether made orally or in writing, are actionable *per se*.

1. In the United States, a charge of having committed a crime, which is indictable[3] and also involves moral turpitude, or which subjects the doer to an infamous punishment. In England, a charge of having committed a crime which is punishable corporally and not merely by a fine or pecuniary penalty. To accuse a man of being a thief, a robber or a murderer comes under this rule, but not a mere accusation of having committed some trifling offense such as selling liquor without a license or being drunk in the public street. A charge of conduct which is disgraceful, disgusting, disreputable or morally wrong, but not criminal, is not actionable under this head, *e.g.* to charge a girl with self-pollution or a man with false swearing in such circumstances as not to amount to the crime of perjury. At common law fornication, adultery and prostitution were not crimes, and accordingly it was not actionable *per se* to accuse a woman falsely of unchastity. In most places, however, that rule has been changed, Charges of crime. Disgraceful conduct. Unchastity.

[2] At common law the rule was otherwise as to criminal libels; see § 1221.

[3] See § 1251.

either by statute or without statute, and such charges are now actionable.

Charges of having an infectious disease.

2. It is actionable *per se* to assert that a person has at the time of the publication, not merely that he has had in the past, the plague, leprosy or syphilis; and perhaps any contagious disease, like small pox, which is much dreaded in the community, at least if an epidemic of that disease is raging and causing general alarm.

Charges of incompetence or misconduct.

3. A charge of incompetence, misconduct or want of integrity in a public or private office or employment of trust or profit which the person holds at the time of the publication is actionable *per se; e.g.* to charge the lieutenant governor of a state with being beastly drunk while presiding in the senate, to say of a justice of the peace that he is a "damned fool of a justice," or of the president of a bank that he is unfaithful to the interests of the stockholders.

Charges injurious to a person in his business.

4. A charge is actionable *per se* which tends to injure a person in his trade or occupation, because it "either shows the want of some general requisite, as honesty, capacity, fidelity or the like, or connects the imputation with the" party's "office, trade or business." Thus to say of a merchant that he is bankrupt or keeps false books is slanderous; but the same statement made about a clergyman or a day laborer would not be; keeping books is not necessary or usual in their business, and keeping them wrongly does not show any unfitness in them, nor does insolvency. On the other hand it would be actionable to accuse a clergyman of unchastity, though that might be said with impunity of a merchant. An assertion that a person has not skill in his trade or occupation comes within this principle; but the charge must be of general unfitness, not of making a mistake in a particular instance, which any one may do. The charge must be against the person himself in relation to his business, not about his business itself or his goods. It is not slanderous to say that a dinner furnished by a caterer was vile and the wines undrinkable.

431. In the four cases above mentioned it makes no difference whether the words are spoken or written; but in addition to those, false and derogatory matter published in writing, print or other permanent form is libellous *per se*, if it is "injurious to the character or credit, domestic, public or professional, of the person concerning whom it is uttered, or in any way tends to cause men to shun his society, or bring him into hatred, contempt or ridicule."[4] Thus it is libellous to call a man in print a "skunk," to declare that he smelt of brimstone as though he had just come out of hell, or to charge him with being an illegitimate child or insane and dangerous to be let go at large. Libels actionable *per se*.

432. Beside publications which are actionable *per se*, any false and derogatory publication about a person, oral or written, is a violation of his right of reputation, if it actually causes him special damage. This means pecuniary damage only; but in this class of cases the idea of pecuniary damage is given a very wide scope, extending to the deprivation of any thing or service which the person would have received or acquired, even by way of mere gift, which can be considered as having any pecuniary value. Thus loss of the hospitality of friends, as distinguished from their society and friendship, is special damage, and so is the loss of a marriage; but being turned out of a religious society is not, because membership in such a society brings no pecuniary gain, nor, perhaps, the loss by a wife of her husband's *consortium*, at least if he continues to support her. Publications not actionable *per se*. Special damage.

[4] Pollock, Torts, 206.

CHAPTER XXVI.

PROPERTY.

Meaning of property.

433. The name property is used to denote either a thing or a right in a thing. Thus we say that land is property, or that a person has a property in land. Property, in the sense of rights, is either normal or abnormal.[1] A normal property right is a right *in rem* in a corporeal thing. An abnormal property right is any right that is transferable, and therefore has value, but which lacks one of the above named attributes. It may be a right *in rem* which does not have a corporeal thing for its subject, such as a franchise or a patent right, or a right *in personam*, such as a debt.

Normal and abnormal property.

Ownership.

434. Among normal property rights the most important is ownership or dominion (*dominium*.) This is not a simple right, but a group of rights, comprising both permissive and protected rights.

Permissive rights; possession and use.

Assignability.

On its permissive side ownership can be divided into the right to possess the thing and the right to use it. Some writers add a third sub-right, the right to assign or transfer the thing. But this is incorrect; assignability is not a separate right, but an attribute or quality belonging to all property rights. The right to transfer the physical possession of the thing to another person is a part of the right of use.

Exient of right of use.

Abuse.

Fruits.

Use injurious to others.

The owner's right of use is unlimited, extending to every use of which the thing is capable, and including what is sometimes called the right of abuse, that is, the right to injure or destroy it. He also has a right to take the fruits or increase of it, which right is called in the Roman law *fructus*. He may not indeed in most cases use it to the injury of others; not, however, because his right of property does not comprehend every possible use of it, but because he is restrained by duties corresponding to rights of theirs, duties

[1] These terms are not in common use.

which are based on the principle expressed in the famous maxim: *sic utere tuo, ut alienum non laedas.*

435. On its protected side ownership also comprises two sub-rights, *i.e.* there are two conditions of fact which the law protects for the owner's benefit.[2] The first of these is his possession of the thing. For another person to have possession of it violates the owner's right. But since possession in its completest form includes the power entirely to exclude others from the thing, any physical interference with it, however slight, any contact between it and anything else, is also a violation of the right of possession, *e.g.* merely walking across land without doing any harm, or throwing stones upon it.

Protected rights.

Possession.

436. The owner of a thing has also a right in its physical condition, which is violated by any change in that condition, whether for the better or the worse. Thus to build a house upon another's land, even though the house becomes the property of the owner of the land and adds greatly to its value and usefulness, or to paint a valuable picture upon another's canvas, is a violation of the property right in the land or the canvas as much as pulling down a house or cutting to pieces the canvas would be. The incursion into land or buildings of such intangible things as noise, smoke, smells and the like violates the right of property, even though they do not do any actual physical harm, provided they cause substantial discomfort or annoyance. Thus a church corporation may have an action against a railroad company for making noise on Sunday so as to annoy and molest the congregation and render the church, which is their property, unfit for a place of worship, though a member of the congregation could not have any action as for a personal injury to himself.[3]

Physical condition.

Incursions of impalpable things.

The right in the physical condition of land, buildings and other structures includes a right in the condition of other things, or even of persons, on the land or in the

Persons and things on land.

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[2] Compare the two sub-rights of bodily security in § 420.

[3] See § 424.

structure, in whose condition the owner has rights or whom or which he brings or keeps there in the exercise of his right in the land or structure. Although an injury to such a person or thing may be a separate wrong, yet if it is done in the course of a violation of the right in the land or structure, it may be treated as a part of that violation. Thus if smells or unwholesome fumes from a factory, slaughterhouse or the like come upon land and make the owner's family, servants or cattle sick, he can recover for such injuries to them in an action for a nuisance to the land. So the owner of land can recover in a single action, as for an injury to his land, for unlawfully entering his house and taking away his chattels or debauching his daughter; though if he chooses he may have a separate action for the latter.

Value.

The right of property has nothing to do directly with the value of the thing, but only with its possession and physical condition. Mere deterioration in value is not by itself a violation of the property right.[4] For instance building a high embankment near a house and running railroad trains along it, so that the house and garden are overlooked, their privacy destroyed and their value greatly reduced, is not a violation of the owner's right, there being no physical interference with the premises.

Inferior property rights.

437. Property rights which are less than full ownership are of three kinds.

Fragments of dominion.

1. Fragments of dominion. The complex group of rights which make up full ownership can be divided and the different parts held in different hands, each part being an inferior property right. The sum of these parts is equal to the whole. The totality of rights is not changed, but is merely distributed; no new kind of right is created, nor does any new duty arise corresponding to the rights *in rem*.

Duties when ownership is divided.

Outsiders owe just the same duties as before, only instead of owing them all to one person, the owner, they owe them to several persons, part to one and part to another. Therefore

[4] In actions for injuries to property damages are sometimes given for deterioration in value; but this is upon another principle. See § 897.

in describing these rights it is only necessary to point out which or how much of the rights already described each inferior proprietor has. The rights of a hirer or other bailee, or of a tenant of land or a person who has a right of way across land are of this sort. The rights which corresponded to these in the Roman law, which were mostly included under the name *jura in re aliena*, seem generally, though there is some confusion in the language of the authorities on that subject, to have been viewed in a different light. They were looked upon not as being parts of the dominion temporarily separated from it, but as new rights, extrinsic to the dominion, which so long as they existed interfered with the exercise of his rights by the *dominus*, and so constituted burdens upon the dominion. The sum of all the rights in the thing was not equal to full ownership only, but to ownership plus the inferior rights of persons other than the owner.

Jura in re aliena.

Burdens on ownership.

When the owner of a thing parts with a portion of his rights retaining a right of present possession, as for instance if he grants to another person a right of way across his land, or parts with the present possession but in such a way that the right of possession will revert or come back to him in the future, as where a person pawns his watch or lets his land to a tenant, his right is still called ownership, although strictly it is not such in the fullest sense. When the present possession is parted with, the right remaining in the owner is also called a reversion and he himself a reversioner.[5]

Ownership subject to rights of others.

Reversion.

438. 2. Rights accessory to dominion. The owner of land usually has certain rights in adjacent or neighboring land, for example a right to have his land supported by it, or rights as to the flow of water from or to it or to the access of light and air over it to his own land. These rights are not rights in his own land, because their subject is the adjacent land or the water; but they are accessory to his property right and burdens upon the property right in the adjacent land.

Rights accessary to dominion.

[5] Strictly these terms apply only to real property, but they are often used of personal property also. See § 443.

Things that can not be owned.

439. 3. Rights in things incapable of full ownership, such as dead bodies or the sea, which can not be owned by any one, but in which certain limited rights may exist. Thus the family or personal representatives of a deceased person have certain rights in his body for the purposes of protection and burial.

Nature of inferior property rights.

440. Inferior property rights differ from ownership in some or all of the following respects.

Duration of right.

1. Ownership regularly endures as long as the thing owned continues to exist; but an inferior property right may be limited in duration, *e.g.* a person may hire a thing for a fixed term, or his right may be subject to be put an end to at the pleasure of the owner.

Possession.

2. An inferior property right may or may not include the right of possession. A tenant of land or the bailee of a chattel has a right of possession, although he is not owner, but a person who has a right of way across land or a right of support for his own land in adjacent land has no right of possession of the latter land.

Limited right of use.

3. The right of use may be limited, and this in various ways.

Innocent use.

(*a.*) Often the right of use is confined to what is called innocent use, that is to such uses as do not injure the thing, there is no right of abuse or to commit waste[6] upon it.

Definite and indefinite use.

(*b.*) The owner's right of use is entirely indefinite; but a person may have a right to use a thing in definite ways only. Thus a man may obtain the right to pasture his cattle upon land without being permitted to use it in any other manner, or may hire a horse and carriage to go to a particular place, in which case he has no right to go anywhere else with it.

No right of use.

(*c.*) Some inferior property rights do not include any right of use at all. Thus a creditor who takes a pledge for his debt generally has no right to use the thing pledged.

Protected rights of inferior proprietors.

441. 4. As to protected rights, it is not always the case that the possession and physical condition of the thing are

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[6] See § 482.

protected for the holder of an inferior right as fully as they are for the owner. The rule is that any such holder has so much of the protected right as is necessary to secure him in the enjoyment of his rights to possess or use, and no more; that is, the extent of his protected rights is limited by that of his permissive rights. It is not possible to confer upon a person a protected right in the possession or physical condition of a thing larger than is needed to enable him to possess or use it as he has a right to. Thus where a canal company had granted to the plaintiff the exclusive right of using pleasure boats on its canal, it was held that he could not have an action as for a violation of his right against the defendant who used such boats there, unless he proved that the defendant's use interfered with his use. The plaintiff had no right of possession, so that the interference by the defendant with the possession of the canal was no violation of his rights, and his only right *in rem* in the physical condition of the canal was to have it in such condition that he himself could use boats on it. The condition of its being entirely free from pleasure boats was one in which he could have no right against persons generally; though since the owners had contracted with him that he should have an exclusive right, he had such a right against them, *i e.* a right *in personam*, and he could have an action against them for a breach of their contract, if they permitted other persons to use pleasure boats there. But in the case of rights accessory to dominion, the protected right relates to the use of the principal land.

Who may sue for injuries to possession.

442. Any one who has a right of present possession may maintain an action for a wrongful interference with the possession, because his right is violated, whether he is the owner or not; and he may even have such an action against the owner himself, if the latter has not also the right of present possession. Thus the hirer of land or of a chattel may sue any one who wrongfully enters upon the land or takes the chattel away from him, or who wrongfully injures the land or chattel. When the possessor's right is precarious, the owner of the thing usually has also a right of present

Double rights of possession.

possession, so that there are two persons who have such rights, and a wrongdoer who meddles with the thing may be exposed to two actions. Thus if A lends a chattel to B with a right to take it back at any time, both A and B have the right of present possession, and if C wrongfully takes it from B or injures it, both may sue him for the wrong.

Persons having no right of present possession.

But a person who, although having property rights in a thing, has no right of present possession, can not sue for any interference with the thing that merely violates the right of possession, but only for such an impairment of its physical condition as interferes with the exercise of whatever right of use or enjoyment he may have in it. Thus a person who has a right of way over land may have an action for digging a ditch or building a fence so as to obstruct his passage, but not for doing the same acts on another part of the land or for merely passing over the way when he himself is not using it.

For what a reversioner may sue.

A person who has a reversionary interest in a thing, and who therefore has no present right of use at all, but will have a right of use in the future when the present possessor's right has come to an end, is only wronged by, and can only sue for, an injury to the thing of such a permanent nature that his right of use will be impaired by it when the time comes for him to enjoy it. Thus if land is let for ten years, and during that time a trespasser enters upon the land and cuts and carries away grass or growing crops, that is an injury to the tenant only, not to the landlord. But if he cuts timber or tears down a house, that is a violation of the rights of the landlord as well as of the tenant, because when the tenancy is ended the property will revert to the landlord in a condition less fit for his use.

Permanent injuries.

The courts have experienced considerable difficulty in determining what kinds of injuries are sufficiently permanent in their nature to amount to violations of the reversioner's rights. But that is a matter of detail merely; the general principle is quite clear that a person who has a right in a thing exercisable only in the future can only sue for such

injuries to it as will affect his future enjoyment of it. But for such injuries he may sue immediately, and need not wait till his right of enjoyment accrues.

Real and personal property.

443. Property is divided into real and personal. These names are somewhat inappropriate. The word real[7] means etymologically that which pertains to a thing. But all normal property rights are rights in things. On the other hand all rights belong to persons, and there seems to be no propriety in specially designating a particular class of property rights as personal. In the civil law the names real and personal, as applied to rights, mean the same as *in rem* and *in personam*. The origin of the common law significations of the terms was as follows. In the civil law a real action is one that is brought to specifically enforce a right *in rem*, *e.g.* to recover the actual possession of a thing, either movable or immovable, in which the plaintiff has a right of possession; while a personal action lies to enforce a right *in personam*, *e.g.* an obligation to pay a debt or to make compensation for a wrong. The old English lawyers adopted this classification of actions, but, as was the case with some others of their borrowings from the civil law, they either misunderstood it or deliberately altered it. They confined the name real actions to actions which were brought to recover the possession of land or to specifically enforce certain rights *in rem* which were more or less directly connected with the use of land, and classed all other actions, including actions for the recovery of the possession of chattels, as personal actions. In course of time the names real and personal were carried over from the actions to the rights upon which the actions were based; those rights which could be vindicated in real actions were called real rights or real property, and those whose violation gave rise to personal actions only were called personal rights or personal property.

No general definition.

There is no general definition of real or personal property, because the distinction between the two was not originally made upon any theoretical or systematic basis.

[7] Latin *realis*, from *res*.

The feudal law.

Speaking roughly it may be said that real property comprises certain rights in land or rights in some way connected with the use of land, which in the time of the feudal system were brought under feudal rules, while under personal property are included all property rights which for any reason did not find a place in that system. The law of real property is in the main constructed of feudal materials, and still presents in many parts a somewhat archaic complexion, though it contains a large infusion of modern elements, and especially in those portions of it which are administered in courts of equity, has borrowed to a considerable extent from the civil law. The law of personal property on the other hand has taken very little from the feudal law, and is much more modern in character than the other.

444. Real property is described as consisting of land, tenements and hereditaments, which appellations are not mutually exclusive. The meaning of land has been already explained.

Land, tenements and hereditaments.

The names tenement and hereditament are used, like the word property, to denote either the right or the thing, whether corporeal or incorporeal, which forms the subject of the right.

Tenements.

Tenement is anything which is capable of being held under feudal rules, or, in technical language, held on tenure. It therefore includes land and all rights in or connected with land which in the old law implied the existence of a feudal relation between the holder and a feudal lord.

Hereditaments.

Hereditament is anything which on the holder's death descends to his heir, *i.e.* which can be inherited. One of the chief differences between real and personal property is that the former in most cases passes to the heir of the holder at his death, while the latter does not, but goes to an entirely different person, who is known as the personal representative of the deceased. Hereditaments include land and also most rights which are classed as tenements, together with a few things and rights which are neither land nor tenements, such as heirlooms,[8] the right to take advantage of the breach of a condition subsequent,[9] or the right to acquire an estate by entry.[10]

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[8] See § 661. [9] See § 261, 274. [10] See § 460, 893.

Land, and also tenements and hereditaments when considered as things, are called things real, while all other kinds of things are things personal. The distinction between things real and things personal does not correspond exactly to that between real and personal property. Although land, the thing, is always real, there are some rights in land which are personal property. The same is true of incorporeal hereditaments. Things real and personal.

The differences between real and personal property are so many and important that it will be necessary to treat of the two kinds of property separately. Real property will be first considered.

CHAPTER XXVII.

THE FEUDAL SYSTEM.

The feudal system.

445. The feudal system has been described as "a complete organization of society through the medium of land tenure, in which from the king down to the lowest landowner all are bound together by obligations of service and defence: the lord to protect his vassal, the vassal to do service to his lord; the defence and service being based on and regulated by the nature aud extent of the land held by the one of the other." Sometimes "the rights of defence and service are supplemented by the right of jurisdiction. The lord judges as well as defends his vassal; the vassal does suit[1] as well as service to his lord."[2] There were thus three elements that entered into the feudal system: (1) a personal relation between lord and vassal, (2) a relation of land-holding, (3) jurisdiction. The first two were essential, the last very common.

The personal relation.

Commendation.

446. 1. The personal relation. Commendation, or the practice of free individuals voluntarily attaching themselves in the capacity of followers or retainers to chiefs or powerful men, prevailed long before the feudal system among all the Teutonic tribes, and very similar customs have existed in other nations. This was one of the roots of feudalism In the feudal terminology the superior was called lord, and the inferior vassal, baron[3] or simply man. The relation of vassal did not imply anything derogatory to the status of a free man. It was entered into by the voluntary agreement of the parties, the vassal taking an oath of fealty or faithfulness to the lord, and usually also performing a ceremony called homage (*homagium*) or manhood, "openly and humbly kneeling, being ungirt, uncovered, and holding up his hands

Lord, vassal, baron.

Fealty.

Homage.

[1] Attendance at the lord's court; see § 101, 454.

[2] 1 Stubbs, Const. Hist. of Eng., Ch. IX.

[3] See § 63.

both together between those of his lord, who sate before him; and there professing that he did become his man, from that day forth, of life and limb and earthly honor; and then he received a kiss from his lord."[4] The vassal might at any time put an end to the relation by a formal "defiance" or renunciation. Defiance.

A man who was himself a vassal might in turn have vassals under him to whom he stood in the relation of lord. Such a person was called a *mesne* or intermediate lord; and at the top of the whole system stood the King as lord paramount. The feudal lords, besides their free retainers, usually had unfree dependants. Some of those were mere slaves, who were regarded as property and stood in no feudal relation to their master, and others were in various conditions intermediate between freedom and slavery, whose relations to their lord were to some extent brought under feudal rules. *Mesne* lords. The lord paramount. Unfree dependants.

447. 2. The relation of land holding. The land held by the vassal of the lord was called a benefice (*beneficium*), fief, fee, feu or feud.[5] Originally benefices were granted by the kings or chiefs of the barbarous tribes who overran the Roman empire to their friends or followers; and in troubled times small land owners for the sake of protection surrendered their lands to powerful men, or to ecclesiastical corporations thus putting them under the protection of the church, and received them back as benefices. The land.

Feudalism arose from the fusion of the system of commendation with that of benefices. In England at least the two relations became inseparable. The relation of lord and vassal could not exist unless the vassal held land of the lord, and a fief could not be held except by a vassal of a lord. Origin of feudalism.

A vassal to whom land was given by his lord did not become the owner of the land. He acquired only an inferior property right in it, which was called an estate; and he himself was not called owner (*dominus*,) but tenant or holder. Rights of the vassal in the land. Estates. Tenants.

[4] 2 Blackstones's Commentaries 63.

[5] The etymology of these terms, except benefice, is uncertain, and has been the subject of much controversy.

Allodial land.

Land which was not held of a lord was known as allodial land (*allod, allodium.*)

Infeudation.

The act of giving land by a lord to his vassal was called infeudation; if the vassal in turn gave it to a vassal of his own, that was known as sub-infeudation. Legally there was no limit to the number of sub-infeudations that might be made of the same land. Infeudation was accomplished by the ceremony of investiture, by which in the presence of his other vassals[6] or certain of them the lord declared that he gave the land to the vassal and stated the terms and conditions of the gift. The vassal swore fealty to his lord and in most cases did homage, and then received from his lord a ring or garment (*vestimentum*) as a symbol, by which ceremony he was regarded as being put into the possession of the land. Investiture was thus a bilateral juristic act involving the consent and active participation of both the lord and the tenant; it included the putting the tenant into possession of the land. It was entirely oral, no writing being used but the memories of the witnesses being relied upon for evidence of the transaction.

Sub-infeudation.

Investiture.

Seizin.

448. A tenant who had been duly invested by his lord was said to be seized, or to have or be in seizin, of the land or of the estate. Seizin is commonly said to be the same as possession. If that was ever true, it certainly is not true now. It is, and for several centuries has been, possible and common for a person to be in possession of land without being seized or to be seized without being possessed. It was a principle of the ancient common law, long since obsolete, that the ownership of or an estate in a corporeal thing could not be acquired without getting possession of it; but that rule did not apply to incorporeal things. A person who in that manner acquired a right in any corporeal thing, land or a chattel, was said to be seized. The land of which a free tenant was invested with seizin might be in the actual occupation of unfree holders or of hirere; but such persons were at first regarded as not having possession of it, but

[6] The peers of the lord's court; see § 454.

only detention, so that their occupation did not interfere with the possession of the invested tenant. In such cases seizin, whether legally identical with possession or not, actually coincided with it. Afterwards unfree holders and hirers came to be ranked as possessors, though they never were admitted to have seizin, so that seizin and possession might be separated. The original meaning of seizin, therefore, was either the possession of a corporeal thing, or the holding or *quasi*-possession of a right in such a thing acquired by getting possession of the thing, which would of course be easily confounded with the possession of the thing itself.

Present meaning of seizin.

At a very early period the word seizin ceased to be applied to the holding of chattels and was confined to the holding of lands, tenements and hereditaments, *i.e.* of real property, and on the other hand it was extended to include the holding of incorporeal hereditaments. This is its present use. It now denotes, and for a long time has denoted, the having the status and estate of a freehold tenant in a thing real, corporeal or incorporeal, whether the tenant has possession or acquired his right by getting possession or not. The word seizin is also used as synonymous, in some cases, with estate, to denote the right of the tenant itself instead of the fact of the *quasi*-possession of the right.

Secondary meaning of seizin.

Grants for life or in perpetuity.

449. A feud might be granted to a tenant for his life only, or to him and his heirs forever.[7] Apparently the former was at first the more common way, for it was the rule of the common law that if land was granted to a man and no other duration of his holding was specified, the grant was for his life. And such is still the law. Also even when the feud was descendible to the heir, the heir did not become tenant until he had been admitted as such by the lord. He was obliged to

Rights of the heir before admission.

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[7] Blackstone says that feuds were at first granted precariously, to be held at the will of the lord, who might at any time take back his gift. (2 Black. Com. 55.) But later writers have denied this. Feuds were probably not so granted in England after the Norman conquest; though there are some things in the law, *e.g.* the rules as to the effect of ouster, (See § 450), which seem to point back to a time when feuds were precarious.

make an application to the lord for the delivery to him of the land, or, as the technical phrase was, to "sue his livery" from the lord. The lords took advantage of this to exact payments from heirs, as if the admission were a matter of grace which the lord might withhold if he chose. Between the death of his ancestor and his own admission the heir had no estate or seizin, no *jus in re,* in the land. If any person trespassed upon the land, the heir could have no action against the wrongdoer for the injury; he had not been wronged, no right of his had been violated. He had only a claim to the estate, *jus ad rem,* which was called a "mere right" or a "bare right," and which, if the lord refused to admit him, he could enforce by means of a real action, and so get himself duly invested with the estate. It was a facultative right merely. As soon, however, as he had been admitted and invested, his estate was deemed to relate back to the time of his ancestor's death, as if the admission had taken place at that time, and he could then sue a stranger for any trespass committed upon the land in the mean time.

Mere right.

Rights of heir after admission.

Ouster.

450. Although, if a feud was given for life or in perpetuity, the lord had no right to expel a tenant, yet, whether by a mere survival from a time when feuds were precarious or because of the importance of always having a *de facto* tenant who could perform the feudal services, the rule prevailed that if the lord did eject a tenant and admit another in his place, the rightful tenant thus dispossessed lost not only the possession in fact and the power to exercise his right, but he lost his right, his estate, itself. He ceased to be tenant, lost his seizin, in technical language was ousted, and had only remaining a bare right similar to that of an heir before admittance by the lord, a right to recover his estate by a real action or other appropriate proceeding. In the mean time the person wrongfully admitted by the lord became not only the possessor of the land, but the tenant of the estate with all the rights and duties of a tenant. He only could sue for any injury done to the land. And the rightful tenant, although he could sue the usurper for the original wrong committed by the very act of expelling him, since at that time he was

Rights of the *de facto* and rightful tenants.

still seized, could not sue him for his continued after possession of the land or for any injury that he did to it while in possession, nor could the rightful tenant sue a stranger for any trespass committed upon the land while the usurper remained in possession; because during that time the estate, the right of property, was in the usurper not in the rightful tenant.

Ouster is not succession.

The usurper was not the successor of the rightful tenant; he did not obtain by the usurpation the same estate in the land which the rightful tenant had had before him, but a new and independent estate, derived directly from the lord; and the former estate of the lawful tenant was simply destroyed.[8] The usurper's new estate, however, was a defeasible estate, that is, it could be defeated or put an end to by the rightful tenant by proper proceedings for that purpose, *e.g.* by a real action. And when that was done, and the rightful tenant had regained his seizin, he in turn did not come in as successor to the new estate of the usurper; but that estate was extinguished, and the rightful tenant was regarded as being "in of his old right," that is, his former estate, which had been destroyed by the usurpation, was revived and again vested in him, and, like the heir's estate after admission, related back to the time of the ouster, and was deemed never to have been interrupted. The lawful tenant therefore, having regained his former estate, could now treat the usurper as having never had any estate but as having been a mere trespasser, and could hold him responsible in a proper action for the wrong done by his unlawful occupation of the land and also for any damage that he had done upon it during his occupancy, and could have a like action for similar damage against any stranger who had trespassed upon the land after the ouster.

Regaining of seizin by the rightful tenant; his rights.

Essentials of a complete title.

In order therefore to have a complete and indefeasible title to land a person must have both the seizin and a good right to the seizin. Such a title is called a double right, *jus duplicatum*, *droit droit* or *juris et seizinae conjunctio*.

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[8] See § 267.

The lord's rights in the land.

451. A lord who had given land to a tenant retained nevertheless a certain right or interest in the land, which was a property right. He had a right to the feudal services which the tenant was bound to render, and a chance that the land might come back into his possession again, or, in technical language, escheat to him, by reason of the tenant's forfeiting his estate through failure to perform his services or through the commission of certain crimes or of his dying without leaving any heir to whom it could descend. These rights were all that the lord had in a feud which had been given to a tenant and his heirs in perpetuity. The rights of the lord were called collectively an honor, lordship or seigniory. They were a kind of hereditament, but were not regarded as constituting an estate in the land. But if the land had not been granted in perpetuity, *e.g.* if the gift had been only for the tenant's life, then the lord in addition to his lordship had also a reversion in the land, which was an estate.

Lordship or seigniory.

The lord's reversion.

The lord's judicial powers.

452. 3. Judicial powers. Sometimes, but not always, the lord, in addition to the personal relation and the relation arising from land holding that existed between him and his vassals, had judicial powers over them, that is, had the right to hold courts for the trial of causes in which they were concerned. These will be more fully described in connection with the subject of manors next to be taken up.

Manors.

453. A manor[9] (*manerium*) is a small territory, often coterminous with a township or parish, organized in a peculiar manner under the jurisdiction of a lord, who may or may not be a nobleman. A great part, but not the whole, of the area of England is covered by manors. The chief officer of a manor is the steward, who is the agent and representative ofthe lord.

[9] The origin of manors is involved in much obscurity and dispute. Some authorities regard them as having been originally the free townships or village communities, in which the English conquerers of Britain settled themselves, which in some way fell under the power of feudal lords, or as having been in some cases formed on the model of those. Others deny that the English settlers ever were so organized, and assert that manors had from the first a servile chsracter, being the estates of great men peopled by their dependents, and that the introduction of free tenants was a later innovation. See Seebohn, English Village Communities, Chapt. XI.

The land of the manor is, or anciently was, divided into four parts. There was first the lord's demesne *terrae dominicales,* which was the portion that he retained for his own use, on which stood his manor house or mansion. A second part was held of the lord by free tenants, who were called the barons of the manor. Thirdly, there were the holdings of the unfree tenants. The land held by the tenants constituted the tenemental land of the manor. Lastly, what remained formed the common land or waste of the manor, called also the lord's waste, which was in the possession of the lord, but in which the tenants had various rights of use, such as the right to pasture cattle or to take wood or turf for fuel.

The land of the manor.

The demesne.

The tenemental lands.

The waste.

454. Incident to every manor were the manorial courts, which were or might be three in number.

The manorial courts.

The first and most important of these was the Court Baron, the court, that is, of the barons or free tenants of the manor, who were called the *pares* or peers of the court. This court was an assembly of the free tenants, and, like the old English courts generally, was partly an administrative and partly a judicial body. In the former capacity it attended to the general business of the manor, which, as has been said,[10] absorbed the whole or a part of the functions of the township. In the latter capacity it acted as a court in the proper sense and tried causes. It had jurisdiction of suits relating to lands in the manor and of petty personal actions where the debt or damages did not exceed forty shillings. It was the lord's court; the profits of it accrued to him, and he or his representative, usually the steward of the manor, was its presiding officer. This court was essential to a manor, and if the number of tenants for any reason was so diminished that there did not remain at least two suitors to constitute the court, the manor became extinct.

The Court Baron.

The second of the manorial courts was the Customary Court, which had superintendence of the holdings of the unfree tenants. This also was presided over by the lord's steward.

The Customary Court.

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[10] See § 105.

The Court Leet.

In some manors there was a third court, the Court Leet, held before the steward of the manor, which was a criminal court having jurisdiction of various petty offences, and also had certain administrative functions. The right to have such a court was not incident to every manor, but was conferred upon the lord by a special royal grant or charter.

Franchises or liberties.

455. Sometimes several manors under the same lord were grouped together for the purpose of holding these courts, and one set of courts was held for all, which were regarded as the courts of each manor respectively. Such a group of manors, or the right of the common lord, was called a liberty or franchise; and the courts of the liberties often possessed by virtue of grants from the crown a somewhat more extended jurisdiction than the ordinary manorial courts. Their jurisdiction was sometimes concurrent with and sometimes exclusive of that of the public popular courts, but never excluded the jurisdiction of the King's courts.

The feudal system in England.

456. The beginnings of the feudal system can be traced in England before the Norman conquest. The practice of commendation and the personal relation of lord and retainer were common, and grants of land were made on condition of the performance of services by the grantee. But at the time of the conquest that system had reached a much fuller development in Normandy than in England, and during the century or two following the conquest the Norman lawyers made the system with which they were familiar the basis of the land law of the latter country. All the land was brought under feudal rules, so that since that period there has been no allodial land in England.

The land belongs to to king.

By the feudal law, which is still in force, the King is the owner of all the land of the kingdom. No one but he can own land; the utmost right that a subject can have in it is an estate, which theoretically at least is an inferior property right. The legal theory is that all titles to land are derived immediately or mediately from the Crown. The King, having it all in his hand, is supposed to have granted it in the first place to his own vassals, who, holding it directly from him, were called tenants in chief (*in capite*.) Some of

Grants from the king.

Tenants in chief.

those granted parts of it to their own vassals, thus becoming themselves mesne lords, and these latter grantees in turn allotted portions of it to tenants under them; and so on, until the land at last reached the actual holder, who was called the *terre* tenant or tenant *paravail*, and the feudal hierarchy was constituted from the top downwards.

Regrants by mesne lords.

The *terre* tenant.

This theory represents to some extent what actually took place. After the Norman conquest and after the various civil wars with which England was distracted extensive confiscations took place, bringing a great deal of land into the King's hands, which he did grant out as fiefs; and doubtless his grantees in turn often made grants to their own retainers. It would be almost necessary for a Norman noble, holding large estates from the King for which he was bound to perform military service, to provide himself in that way with a surrounding of knights and men at arms. Probably most of the larger tenants in chief were actual beneficiaries of the King. On the other hand it is probable that as applied to the majority of the smaller holders and actual cultivators of the soil, especially those whose services were non-military, the theory of a grant from their lord, and indirectly from the King, was a mere fiction, that the feudal rules were simply applied to their lands as if they had received them by such grants, when in fact they had not.

Truth of the feudal theory.

Feudalization of allodial land.

457. From about the time of Henry I the feudal system, yielding to the conditions of a progressive society, began to decline. Gradually the personal relation between lord and vassal dwindled away, the public courts encroached upon and finally entirely swallowed up the judicial powers of the manorial tribunals, and slavery and serfdom disappeared before advancing civilization; till at last there remained nothing of the imposing organization of feudalism but certain rules relating to the holding of land, and even these have undergone many and important modifications, usually in the direction of enlarging the rights of the tenant. Certain aspects of this process require to be noticed.

Decline of the feudal system.

458. Since the holding of land of a lord implied a personal relation between him and the tenant, it would follow

Alienation of estates.

naturally that neither party could transfer his rights in the land, and thus introduce a stranger into the relation, without the consent of the other. Such consent on the part of the tenant was called attornment; he was said to attorn to his new lord. Blackstone thinks[11] that non-alienability by the tenant was in fact the original rule, at least as to that class of feuds known as true and proper feuds, that is, those which had really been granted by lords to their vassals on condition of military service. Probably, however, it was at no time the general law in England that lands held of mesne lords could not be alienated. Sub-infeudation was freely permitted, because by that the new tenant did not come into any direct relation with the original lord, to whom the original tenant remained responsible for the feudal services due from the land. So that a tenant who wished to sell his land, if he was not permitted to alienate it, made a sub-infeudation of it to the buyer, becoming nominally the buyer's lord and taking the buyer nominally as his subtenant.

Attornment.

Subinfeudation.

The lords, however, found that by sub-infeudations they lost, or were practically rendered unable to enforce, their feudal rights against their own tenants, and they had no claim against the subtenants. To remedy this evil the statute of *quia emptores*[12] was passed, which enacted that on all sales or feoffments of land the transferree should hold it, not of his immediate transferor but of the chief lord of the fee from whom the latter held it. This statute did not extend to the King's tenants in chief, but a similar provision was made as to them by the statutes *de prerogativa regis*.[13] By those acts the lord was brought into a direct feudal relation with the person who would otherwise have become his tenant's subtenant, and could enforce his feudal rights directly against him. Their practical effect was to prohibit sub-infeudation and permit tenants freely to transfer their estates. Since those statutes, therefore, it has been legally impossible for any one but the King to make an infeudation or to create a new

The statute *quia emptores*.

The statutes *de prerogativa regis*.

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[11] 2 Black. Com. 57.

[12] 18 Edw. I.

[13] 17 Edw. II. and 34 Edw. III.

manor, and all land has been alienable. But the same form of juristic act continued to be used for transfer which had before been used for infeudation.

459. For this purpose a modified form of the old feudal ceremony of investiture was employed, which was called feoffment (*feoffamentum.*) This was at first an oral gift of the land in the presence of witnesses, who ought to be persons living in the neighborhood, so that in case of any dispute afterwards arising they could be called upon to declare what was done. Feoffment had to be perfected by livery, *e.i.* delivery, of seizin, until which the feoffee acquired no estate in the land. Feoffment. Livery of seizin.

Livery of seizin was either in deed or in law. Livery in deed was made on the land, by the parties themselves or their attorneys, in the presence of witnesses. The contents of the feoffment were declared before the witnesses, and then, all other persons being off of the land, the feoffor delivered to the feoffee a clod, a twig or some similar thing from the land, with a statement that he delivered it in the name of the seizin of the whole. In case of a house, the ring or latch of the door was delivered, and the feoffee entered alone, the house being empty, and shut to the door, after which he opened the door and let in the others. Livery in law, which could not be made by attorney but only between the parties in person, was made not on the land but near to and in sight of it, the feoffor saying: "I give you yonder land; enter and take possession." This was valid if the feoffee entered during the feoffor's life time. If several pieces of land lying in the same county were conveyed by one feoffment, a single livery of seizin, made on any one of them, was sufficient; but if they were situated in different counties, livery must be made separately in each county. The reason for this was that under the old procedure witnesses from one county could not be used to establish a feoffment in another county.[14] Also if the lands were in the possession of subtenants, though all in the same county, there must have been a separate livery Livery in deed. Livery in law. Land in different counties. Land held by subtenants.

[14] See § 1099.

of the holding of each subtenant, because the attornment of each subtenant was necessary, which fact the witnesses had to take cognizance of. Fealty and homage gradually fell into disuse

Fealty and homage.

Deeds of feoffment.

In course of time it became customary for the feoffor to execute and deliver to the feoffee a deed of feoffment containing a description of the land and the terms of the gift, and by the statute of frauds a deed was made necessary,[15] so that an oral feoffment would not now be valid. After the statute of *quia emptores*, and perhaps from an earlier period, admission of the feoffee by the lord or the consent of the lord in any form was not necessary to a transfer of land from tenant to tenant.

Admission by the lord.

Entry.

460. As the feudal system faded away the consent and co-operation of the lord were dispensed with in all cases of the acquisition of estates by free tenants. Wherever admission by the lord, a bilateral act, had been requisite, the person having a right to the estate was allowed to acquire it by a mere entry upon the land, which was a unilateral act. Thus an heir was no longer obliged to sue his livery of the lord, but merely to make entry upon the land, by doing which he became seized. But until modern times entry by the heir continued to be necessary to perfect his title; before entry he had no seizin or estate but only a bare right. At present, however, the rule is otherwise, and the heir, even without entry, is deemed to be seized immediately upon the death of his ancestor. This is called seizin in law, as distinguished from seizin in fact or in deed which may be gained by entry; but this distinction is of no practical importance.

Seizin of the heir.

Seizin in law.

Custer by mere dispossession.

The principle that a person who had a right to an estate could acquire the estate by his own act of entry without the co-operation of the lord was extended, perhaps illogically and without any necessity for so doing, to persons who had no

[15] The statute of frauds does not mention deeds. But since before that statute there were two methods in use of conveying land, viz: by oral feoffment with livery and by deed with livery, and the statute of frauds forbade the former, a deed remained as the only available method, and the statute was construed to require a deed.

right. Thus an ouster could be accomplished by the intruder merely entering upon the land and taking possession of it with an intention to become tenant, without his being admitted by the lord. And the rightful tenant in turn could in most cases regain his seizin and defeat and extinguish the usurper's estate by his mere re-entry, without being compelled to resort to an action. Re-entry.

461. Entry must not be furtive, but open and public, in the presence of witnesses, and accompanied with a formal declaration that the party entering thereby takes possession; for only such an entry can be considered equivalent to an admission by the lord. But if a person actually takes and holds adverse possession[16] of land, all persons who claim rights in it inconsistent with his possession are thereby ousted, even though his original entry was informal. But in such a case the law will presume *prima facie* that his possession is not adverse. An entry made by force is valid; but now by various statutes, commonly known as statutes of forcible entry and detainer, this is forbidden both in the United States and England. Some of these statutes provide that a possessor of land who is forcibly expelled, or against whom the land is forcibly held by some one who has furtively gained possession, may on application to the court be at once restored to his possession without any inquiry into his right, leaving the right to be determined in a subsequent action for the possession, thus practically nullifying the effect of the forcible entry or detainer; but in some places the statute simply makes the act punishable as a crime without affecting its validity. Manner of making entry. Forcible entry and detainer.

When the entry would be rightful, but in such case only, the party entitled to enter, if he is prevented from doing so by force or threats of bodily injury, may instead of it make a formal claim to the land in the presence of witnesses as near to it as he can. This has precisely the same effect as an entry to put the claimant into seizin and vest in him the estate and the right of present possession, Continual claim.

[16] See § 311.

though of course it does not give him the actual possession of the land, which is a condition of fact, nor even the constructive possession, which can not exist in one person while another is actually possessed. The right gained by such a claim, however, lasts only for a year and a day, within which time the claim must be repeated; hence this is called a continual claim.

The American law.

462. In the United States the feudal system never prevailed. Such slight attempts as were made to introduce it or something resembling it failed.[18] But the English law of real property was brought over by the colonists with its feudal rules and feudal nomenclature, and has in the main continued in force to the present day.

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[18] For instance the constitution devised by the philosopher Locke for the colony of South Carolina, which was rejected by the colonists and never could be put into operation. See also § 476.

CHAPTER XXVIII.

TENURE.

463. Tenure means the terms and conditions on which a tenant holds his land of his lord. Tenure.

The principal division of tenures was into free and servile tenures, the former being those on which the free tenants held their lands, while the latter applied to the holdings of unfree persons. Land held on free tenure was called freehold or frank tenement (*liberum tenementum*). Another division of tenures was based upon the services due from the tenant to his lord being certain or uncertain. Tenures in which the services were certain were included under the general name of socage. Classes of tenures. Freehold. Socage.

464. Tenure in chivalry or by knight service (*per servitium militare*) was esteemed the most honorable species of tenure, and was that on which, so long as it existed, persons of rank usually held their estates. It was the tenure specially appropriate to pure and proper feuds, the feudal system having been in its origin an organization chiefly for military purposes. The tenant by knight service was bound to furnish, if called upon by his lord, for each knight's fee (*feodum militare*) held by him one, fully armed horse soldier or knight to serve for not exceeding forty days in any one year within the realm at the tenant's cost. The quantity of land comprised in a knight's fee is not now known, and has been the subject of much dispute. It is even uncertain whether it was measured by acreage or by rental value. In the reigns of Edward I and Edward II it was estimated to be of the value of £20 *per annum*. In the reign of Henry II the practice was introduced, which became common, of commuting the personal service for a money payment, which was called escuage or scutage (*scutagium*). Knight service. The tenant's service. Knight's fee. Scutage

465. In addition to the military service the tenant by knight service was subject to certain feudal burdens, which in Feudal burdens.

time became very oppressive. These were aids, relief, primer seizin, wardship, marriage, fines for alienation and escheat.

Aids.

Aids seem to have been originally voluntary gifts of money by vassals to their lords on occasions of special need. But three of them, the so called ancient aids, early became matters of right. These were, to ransom the lord's person if he was taken prisoner in war, to pay the expense of making his eldest son a knight, and to provide a marriage portion for his eldest daughter. The lords, however, in many cases exacted aids for other purposes, such as to pay the lord's debts or to enable him to pay his aids to his own lord. This led to the insertion of a clause in *magna carta* forbidding the taking of any aids by the King without the consent of parliament, or by mesne lords, except the three ancient aids.

The ancient aids.

Exactions by the lords.

Relief.

Relief was a payment made to the lord by the heir, provided he was of full age when the inheritance fell to him, for being admitted as a tenant in place of his ancestor. This continued to be payable after admission by the lord had ceased to be necessary.

Primer seizin.

Primer seizin was payable only by the King's tenants in chief, and only if the heir was of full age. Since the heir did not become seized of the estate till he had sued his livery and been admitted by the lord, the lord in the mean time had the right to take the fief into his own hands and appropriate the rents and profits, and by the ancient rule if livery was not sued within a year and a day the estate was forfeited to the lord. The King therefore exercised against his tenants the right to claim one year's profits of the land under the name of primer seizin.

Wardship.

466. If the heir, being a male, was under the age of twenty one or, being a female, under that of fourteen, the lord became the guardian both of his person and of his land, and could take the rents and profits of the land for his own benefit, without being obliged to account for them to the ward, until the heir came of age, or in the case of a female heir till she reached the age of sixteen. This right was called wardship, and the lord the guardian in

chivalry. At the end of the wardship the heir could sue his livery or ousterlemain and receive possession of the land from the lord, but was compelled to pay for doing so a fine to the lord of half a year's profits of the land; and if the heir was a male and held a knight's fee *in capite* of the King, he was also obliged to receive knighthood at a considerable expense or pay a fine to the King if he refused.

Inquisitio post mortem.

In order to ascertain the King's feudal dues an inquiry, called an *inquisitio post mortem*, was held by the King's justices on the death of any large land holder as to the value of his estate, of whom and by what tenure it was held, and who and how old his heir was. In the reign of Henry VIII a Court of Wards and Liveries was created, to which was committed the duty of making these inquiries and granting livery to heirs.

Court of Wards and Liveriss.

Marriage.

Another very onerous right of the lord was the right of marriage (*maritagium*), that is, the right of disposing of his ward in marriage. If the lord offered the ward a suitable match without disparagement, that is, a match with a person of proper rank and station, the ward must either accept it or pay to the lord the value of the marriage (*valor maritagii*), which in case of dispute was to be assessed by a jury, and was understood to mean as much as any one would *bona fide* pay for the privilege of marrying the ward. If the ward married without the guardian's consent, he or she forfeited twice the value of the marriage.

Abuses of wardship.

Those rights of the lord over the infant heir of his tenant were too often treated by the lords as their own perquisites rather than administered for the benefit and protection of the ward, and in many cases were made matters of traffic and sale. Very large sums were paid for the wardship of a fat estate or the marriage of a rich heir.

Fines.

467. Fines for alienation were payments made to the lord by the tenant for permission to transfer his estate to another. These seem to have been confined to the King's tenants in chief.

Escheat.

Escheat was the return of the land to the lord by reason of the tenant's estate coming to an end for want of an heir

or by forfeiture, as will be more fully described in another place.[1]

Other military tenures.

468. There were certain other less common tenures which were classed under tenure in chivalry, because the services were free and uncertain, and because they were subject in general to the same feudal incidents and burdens as the ordinary tenure by knight service.

Grand sergeanty.

Tenure in grand sergeanty (*per magnum servitium*) was where the tenant was bound, instead of serving as a soldier, to perform in person some honorary service to the King, as to carry his banner or sword. A tenant in grand serjeanty was exempt from the obligation to pay aids or escuage, and his relief was one year's profits of the land.

Cornage.

Tenure by cornage, *i.e.* by the service of blowing a horn to give warning of a Scotch raid over the border or of any hostile invasion, was a tenure in grand sergeanty if the land was held of the King, otherwise it was reckoned knight service.

Abolition of military tenures.

469. These tenures in chivalry with their incidents, though they may in their origin under the conditions of the feudal system have been reasonable, came in time, as the feudal state of society passed away, to be felt as intolerable burdens, and in the hands of unscrupulous lords became mere instruments of extortion. Accordingly in the reign of Charles II they were all abolished by statute, saving only the honorary services of grand serjeanty, and tenure in free socage, next to be described, substituted in their place. The Court of Wards and Liveries was also abolished.

Free socage.

470. Tenure in free and common socage,[2] usually called simply socage tenure, was esteemed less honorable than tenure in chivalry, but was still a free tenure.

It was a non-military tenure, and seems to have been that by which the smaller freemen, agriculturists, mechanics and tradesmen, held their lands. The insignificance and mostly low

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[1] See § 581.

[2] The derivation and original meaning of the name socage are uncertain.

social position of these tenants perhaps saved them from the rigorous application of feudal rules which pressed upon their betters. Probably the holders by this tenure were not originally for the most part beneficiaries or grantees of true and proper fiefs, but rather persons whose land had been feudalized. Many points in which this tenure differs from tenure in chivalry seem to be survivals of the law that existed before the Norman conquest, the land being imperfectly feudalized.

Services.

The services due from a tenant in socage to his lord might consist in nothing but fealty and homage; but usually they included also the payment of a fixed rent, either in money, in kind or in labor. The latter two kinds of rent were generally in time commuted for money payments. The value of money in ancient times being much greater than at present, those old feudal rents were usually fixed at sums that came later to be insignificant, and very many of them have fallen into desuetude.

Feudal burdens.

Aids, primer seizin and fines for alienation were formerly incident to tenure in socage as to that in chivalry, but were abolished by the same statute of Charles II that did away with the latter tenure.

Relief is still due from some socage lands, and, contrary to the rule in knight service, is payable even though the heir is under age, because the lord has no right of wardship. The sum payable is one year's rent.

Guardianship in socage.

Guardianship in socage is very different from that in chivalry, being designed for the benefit and protection of the infant heir. The guardian is not the lord, but the nearest relation of the infant, of full age, who can not be heir to the infant, the intention being not to permit any one to be guardian who might have an interest to make way with the infant for the purpose of succeeding him. If the land came to the infant by descent from any one except his father or by purchase, the father, who by the common law could never be heir to his son,[3] would naturally become guardian. Guardian-

[3] See § 646, *et seq.*

ship in socage lasted only till the ward reached the age of fourteen, at which time he was permitted to choose his own guardian, and the former guardian was obliged to account to the ward for all the rents and profits of the estate; so that this kind of guardianship was no benefit but a mere burden to the guardian.

Marriage.

Nor had the guardian any right of marriage over the ward. On the other hand, until the value of marriages was wiped out by statute, if the guardian gave his ward in marriage, unless he married him to advantage, he was responsible to the ward for the value of the marriage, even though he in fact received nothing for it.

Escheat.

Escheat belongs to tenure in socage, as to feudal tenures generally.

Other socage tenures.

471. Certain species of socage tenure presented peculiarities of their own. Among these was tenure in petit serjeanty, which could only exist in land held directly of the

Petit sergeanty.

King, where the services consisted in delivering to the King some small weapon of war, such as an arrow or a sword, in lieu of other rent.

Burgage.

Tenure in burgage is a kind of socage tenure on which land in an ancient borough may be held, the services consisting in the payment of rent. In former times the holding of one of those burgage tenements often gave the tenant certain political privileges or rights in the common lands of the borough such as tenants of a manor had in the common of the manor. Burgage tenements were also often subject to special customs, which were different in different boroughs; for instance in some cases the wife of a tenant had a right of dower after his death in all of his lands instead of in one third only as was the general common law rule, or a tenant was allowed to dispose of his land by will, which as to most lands was not permitted from the Norman conquest till the reign of Henry VIII, but had been allowed before the conquest.

Borough English.

Among those customs was that called borough English, which was that the tenement on the death of the tenant should descend to his youngest son, in opposition to the

ordinary feudal rule under which the eldest son was heir.[4]

Tenure in gavelkind is found principally, though not exclusively, in Kent. It is distinguished from ordinary socage by various peculiarities, the most important of which are that on the tenant's death the estate descends to all his sons equally, not to his oldest son alone; the tenant may alienate his estate at fifteen, whereas in general a conveyance by a person under twenty one is not valid; the estate was not forfeited by the tenant's being convicted of a crime; and it was in most places capable of being disposed of by will, contrary to the rule of the common law. Gavelkind.

Tenure in frankalmoign or free alms (*in libera eleemosyna*) was one on which various ecclesiastical persons and corporations held and still hold land. The services are of a spiritual nature, such as before the reformation praying for the soul of the donor and at present performing religious rites or teaching, and the tenant was not subject to any feudal burdens. Land might, however, be held for religious and charitable purposes on other tenures; and since the statute *quia emptores* no one but the King can give land to be holden in frankalmoign. Tenure in frankalmoign.

472. Both before and after the Norman conquest there were in England various classes of unfree persons, who were distinguished by a variety of names, the exact signification of some of which is not now understood but which probably corresponded to differences in their status. These unfree persons came to be known by the general name of villains[5] (*villani*). They were also called *nativi*, from which is derived the feminine form neife. Villains were either villains in gross or villains regardant. The former were mere slaves, Villainage. Villains in gross and regardant.

[4] It has been suggested that the reason for this rule was that anciently the lord had a right of concubinage with the tenant's wife on her wedding night, whereby the paternity of the eldest son might be rendered doubtful. But probably this cusiom never existed in England; though it did in some other countries, presumably, however, only among tenants who were not fully free.

[5] Also spelled villeins; probably from *villa*.

and could be bought and sold like cattle. The latter were serfs, bound to the soil (*adscripti glebae*) and obliged to render services of a base or menial nature to their lords. The condition of villainage was hereditary, the children following that of the father. Therefore no bastard could be born a villain, being in contemplation of law *filius nullius*. Originally a villain could hold no property, the lord having the right to seize whatever he acquired; the lord might beat his villain at his pleasure, but to kill or maim him or forcibly to violate a female villain was a crime. Emancipation of a villain was effected either by a formal deed of manumission or impliedly by any dealing of the lord's with him which was inconsistent with the condition of villainage, such as granting him an estate, entering into a bond to pay him money or bringing an action against him at law. In course of time, either by the manumission of individuals or by the gradual rise in condition of classes originally servile, villainage entirely passed away. Sir Thomas Smith, secretary to king Edward VI, says that in his time he never knew of any villain in gross, and the few villains regardant then remaining mostly belonged to bishops or monastaries, in whose case religious scruples against impoverishing the church stood in the way of manumission. The last claim of villainage recorded in the courts was in the fifteenth year of James I.

Emancipation.

Extinction of villainage.

Tenure in pure villainage.

473. The lowest classes of villains, whose status was that of actual slavery or closely approximated to it, were known as pure villains. If, as was often the case, they were allowed to occupy land, it was as mere precarious holders, at the will of the lord and on such terms as he chose to impose. Some however, if not all, of this class of villains came in time to be regarded as having some sort of interest in the land which they occupied and as holding on a kind of tenure. This was called tenure in pure villainage. The services consisted in performing servile offices and labor for the lord, and were uncertain both as to time and quantity, the lord having the right, either absolutely or within wide limits, to exact from the tenant such services as he pleased.

Privileged villainage.

Privileged villains were in a ess abject condition than

pure villains, inasmuch as, though still below the condition of freemen, they had definite rights against their lords. Their services, though of a base and servile nature, had by custom or otherwise become determinate, so that they were not subject to arbitrary demands from their lords, but on rendering the fixed services were entitled to the possession of their lands and the free disposal of their own labor. Their tenure was known as privileged villainage; or sometimes, because the services were certain, it was regarded as a kind of socage and called villain socage.

Villain socage.

Tenure in villainage, either pure or privileged, is long since extinct. But there are certain tenures still existing which may probably to a great extent be affiliated upon it. Land and estates held on such tenures are to this day denied the name of freehold, and no doubt the greater part, if not the whole, of such land was formerly held by servile tenants.

Abolition of tenure in villainage.

474. The most important of these is copyhold tenure, which can only exist within a manor. Blackstone regards this as having grown up out of pure villainage, through the gradual acquisition by the tenants of privileges which, originating in mere indulgence on the part of the lord, by custom and prescription hardened into rights, the status of the tenant undergoing a parallel change into something less and less servile and finally into entire personal freedom, and the personal services being commuted in course of time for fixed rents. Other writers have advanced various other theories as to its origin.

Copyhold.

A copyhold tenant holds his land nominally at the will of the lord; but in contemplation of law, which always favors fixity of tenure and definite rights, of which tendency the history of the law of real property presents numerous examples, the lord's will is conclusively presumed to be always in accordance with certain customary rules which have grown up in each manor, and which, though in general nearly the same, vary in details in different manors. Hence the tenant is said to hold at the will of the lord according to the custom of the manor. He is admitted to his holding by the lord or his representative in the Customary Court of the

The lord's will

The custom of the manor.

Admittance by the lord.

manor, and an entry of the admission is made in the records or rolls of the court. A copy of this roll, attested by the steward, is given to the tenant as evidence of his right, so that he is called a tenant by copy of court roll or by copyhold. When a tenant dies and his estate descends to his heir, or when it is sold, the lord can be compelled by legal proceedings to admit the heir or purchaser.

Feudal burdens.

Copyhold tenure, like free tenures, in former times obliged the tenant to fealty and homage, and is still subject to services of various kinds, usually the payment of rent, and, in case the estate descends to the heir, to reliefs and escheat. The lord

Heriots.

is also entitled on the death of a tenant to a heriot, which consists of the best beast owned by the deceased tenant or in certain manors of some other chattel of his, which the lord may seize. There are in some manors fines for alienation, and in some fines in the nature of primer seizin. When the amount of these is not fixed by custom, the law requires that

Wardship.

they be reasonable. The lord has also a right of wardship of the heir of the tenant, when the latter succeeds to the estate, and usually delegates its exercise to some relative of the ward. The guardian is bound to account to the ward for the profits of the estate while in his care, like a guardian in socage.

Enfranchisement of copyholds.

Copyhold land may be enfranchised or turned into freehold by a grant of the freehold from the lord to the copyholder, or by the two rights in any way coming into the same hands, in which case the copyhold is merged[6] in the freehold. Statutes have recently been passed in England to provide for the enfranchisement of copyholds without the consent of the lord on paying him a reasonable compensation for his rights.

Ancient demesne.

475. Tenure in ancient demesne occurs only in certain manors which formed a part of the royal demesne as early as the time of William the Conquerer. It is substantially copyhold and is usually included under that name, differing

The custom of the manor.

from ordinary copyhold only in certain minor particulars. The tenants, or at least such of them as are probably the successors

[6] See § 493.

of privileged villains, are not said to hold, even in theory, at the will of the lord, but simply according to the custom of the manor. When a manor is held by its lord in ancient demesne, the freeholders of the manor, who hold of him, are also called tenants in ancient demesne, and it is said that it is to them only that that name is with strict propriety applied. They form for the manor a Court of Ancient Demesne, which is analogous to the court baron of ordinary manors. Copyholders of such a manor are known as copyholders of base tenure.

Tenants in ancient demesne.

Court of ancient demesne.

Copyholders of base tenure.

There are also in the north of England certain lands held according to the customs of manors but not by copy of court roll, in which nevertheless it is necessary for the tenant to be admitted by the lord in order to acquire the estate. These estates are called customary freeholds or tenant rights. The services seem to have consisted originally of border services against the Scotch. But these tenures, though in some respects like free tenures, are now classed among copyholds.

Customary freeholds.

476. So far as tenure exists in the United States at all, it is tenure in free and common socage. The charters granted by the Crown to some of the colonies specify that lands are to be holden of the King on that tenure. At the revolution the state took the place of the King as lord, and in a few states it is said that the tenure still subsists. But if so, it is purely nominal; there are no rents, services or feudal rights. In some states also guardianship in socage survives, but in an obsolescent condition. There never were any mesne lords or sub-infeudations, except that in two or three states a few manors were set up, which did not flourish and have become extinct. In most of the states, however, the land is expressly declared by the constitution or by statute to be allodial, or has been assumed to be so, and tenure does not exist even in theory.

Tenure in the United States

CHAPTER XXIX.

ESTATES.

Estates.

477. The word estate properly denotes the right of the tenant, but it is sometimes improperly used to denote the land itself. Estates are either of freehold or less than freehold.

Freehold estates.

An estate of freehold meant originally an estate held on a free tenure; but since such estates were always conferred for life or in perpetuity, the name is now confined to estates so granted. Freehold estates are divided into estates of inheritance or fees,[1] which at the tenant's death will descend to his heirs, and estates not of inheritance, or life estates, which will not descend.

Use of the word "heirs."

To make a fee it was at common law necessary that the grant be made to a man and his heirs. No other word but heirs would suffice. If an estate were granted to a man forever, or to a man and his children or his descendents, it was merely a life estate and terminated at the tenant's death. But in a grant to a corporation, which had no heirs, the word successors was substituted. The common law rule still prevails in some of the United States, but in other states and in England the word heirs is not now required, any words showing such an intent being sufficient to pass a fee. Also the word heirs was never necessary in a will.[2]

Fee simple.

478. A fee simple, usually called merely a fee, is the largest estate that can be had in land. It exists where land is given to a person and his heirs generally, without specifying any particular class of heirs, so that on the tenant's death it will descend to any one who is his heir, whether a child or other descendant or some collateral relative. It may be freely sold and transferred, and on the death of the transferee will

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1 The word fee in this use denotes the estate, not the land.

2 As has been said, wills are generally construed less strictly and technically than deeds; see § 348.

descend to his heirs, just as it would have descended to the heirs of the original tenant if he had not transferred it. The tenant is said to be seized in his demesne as of fee; because he has practically dominion, yet not absolute dominion or ownership which only the King can have, but a *quasi* dominion held under a lord as of fee. The rights of a tenant in fee simple are exactly the same as those of an absolute owner, except for such remnants of feudal services as still survive. Practically fee simple is equivalent to ownership, and is generally so called. In the United States, where land is held allodially, it is legally the same as ownership. The fee simple of land must always be in some one; whenever any one has an inferior estate in land, some one else must have the fee simple. This is expressed technically by saying that the fee simple can not be in abeyance.

Rights of the tenant.

Fee simple can not be in abeyance.

A qualified or base fee is an estate to a man and his heirs, but limited to come to an end on the happening of some contingency.[3] It is a fee, because it will descend to the tenant's heirs, and if the contingent event never happens, will endure forever; but on the happening of that event it will cease. An example of this is a fee granted to A and his heirs tenants of the manor of Dale. If the holder of the fee ceases to be a tenant of that manor, the estate is determined. As long as the estate lasts the rights of the tenant are the same as those of a tenant in fee simple.

Base fee.

479. A conditional fee at common law was a fee limited to a person and a particular class of his heirs, for instance to a man and the heirs of his body, *i.e.* to such heirs as were lineally descended from him, so that if he died without leaving any descendant, his brother or other collateral kinsman could not succeed to the estate, but it would revert to the grantor. Under such a grant it is obvious that the tenant would not be able to sell or transfer the estate in perpetuity, because it could not descend to the heirs of the transferee on his death, but only to the lineal heirs of the original grantee. The desire to keep land in a particular family led

Common law conditional fee.

[3] This is a contingent limitation; see § 265.

to the making of many grants of this kind. But the policy of the law has always been opposed to the tying up of property; and therefore the courts construed these grants in a peculiar way, in opposition to their natural meaning and to the actual intention of the donors. They were held to be grants on condition that the tenant had issue. As soon therefore as issue was born to the tenant it was considered that the condition was performed, and the estate became absolute, as least so far that the tenant could alienate it and cut off the succession of his heir and also for certain other purposes; though if he died without having alienated the estate, it could still descend only to heirs of the designated class, and if there were no such heir would revert to the donor. Thus a tenant was enabled to defeat the purpose of the grant by conveying his estate as soon as a child was born to him to some other person, who would immediately convey it back to him in fee simple.

The statute *de donis.*

To prevent this there was inserted in the statute of Westminster 2nd, passed in the reign of Edward I,[4] a provision known as the statute *de donis conditionalibus*, or more briefly, the statute *de donis*, which enacted that, when land was given to a man and the heirs of his body, the intent of the donor should be followed, and the estate should at all events go to the lineal heirs, or if there were none should revert to the donor. The effect of this was that the tenant could not alienate or encumber the estate for a longer time than his own life; the heir had an absolute right, and after the ancestor's death could take back the land from any one to whom the ancestor might have transferred it. An estate of this kind is called a fee tail, *i.e.* a cut or mutilated fee,[5] and land so given is said to be entailed. An estate tail can only be created in land or rights which relate to land. There are

Fee tail.

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[4] This king distinguished himself by so many and great reforms in the law that he has been called the English Justinian. The statute of Westminster 2nd was a long and elaborate act, forming part of a comprehensive scheme of law reform and dealing with many subjects.

[5] From mediaeval Latin *taliare*, French *tailler*.

certain property rights, called incorporeal hereditaments,[6] which are so far real property that they will descend to the holder's heirs, but which, not relating to land, can not be entailed, for instance an office or an annuity not charged upon land. The rights of a tenant in tail are the same as if the estate was a fee simple; the only difference between the two kinds of fees is as to alienability and descent. The words "of his body" or some equivalent words of procreation are necessary to create a fee tail; a gift to a man and his heirs male, without words of procreation, conveys a fee simple, and any heir may inherit. Estates tail are in tail general or tail special. The former are limited to a man and the heirs of his body generally, so that any lineal heir may inherit. The latter are confined to some particular class of lineal heirs, as an estate to a man and the heirs of his body by his present wife. Estates in tail may be farther distinguished as tail male, which is confined to male heirs, and tail female, where only female heirs are admitted. Thus an estate to a man and the heirs male of his body is in tail male general, and one limited to him and the heirs female of his body on Mary, his now wife, to be begotten is in special tail female.

Words of procreation.

General and special tail.

Tail male and female.

A particular kind of estate tail, now practically obsolete, is an estate in frank marriage (*in libero maritagio.*) This arises when land is given by one man to another, together with a wife who is the daughter or near relative of the donor, to hold in frank marriage. This is sufficient to create an estate in special tail in the husband and wife and the heirs of their two bodies, without the use of the word heirs or words of procreation.

Frank marriage.

480. By entail estates would have been effectually tied up and made inalienable forever, and such was the intention of the framers of the statute *de donis.* But by certain proceedings permitted by the courts, in the nature of fictitious suits, which will be described in another place, means were found of cutting off the entail and alienating the estate free from the

Cutting off the entail.

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[6] See Chapt. XXXI.

claims of the heir, thus transforming it into a fee simple. And by various statutes in England entailed estates are to a greater or less extent made alienable and subject to the debts of the tenant.

Estates tail in the United States.

In some of the United States fees tail have been abolished by statute, and in others they are turned into estates in fee simple after one descent, and may then go to collateral heirs. Nowhere can land now be entailed in perpetuity.

Estates for life

481. Freehold estates not of inheritance, or estates for life, are of various kinds. The ordinary case is where the estate is given for the life of the tenant himself, so that at his death it does not descend to his heirs, but is extinguished entirely and the land reverts to the donor. By the common law such an estate may be terminated by the civil death of the tenant, for which reason it became customary to grant such estates expressly for the tenant's natural life.

Estates *pur auter vie.*

An estate may also be given to one person for the life of another, who is called the *cestui* (or *cestuy*) *que vie.* Such an estate is denominated an estate *pur auter vie.* If the tenant dies before the *cestui que vie*, the estate does not go to his heir, but is disposed of in a manner to be hereafter explained.[7]

Life estates by operation of law.

The above mentioned kinds of estates for life are conventional, that is, are created by the agreement of parties or by will; but there are also certain others which are said to

Curtesy.

be created by operation of law. If a married woman is seized of land in fee, her husband after her death has generally an estate for life in the land, which is called an estate by the curtesy; and in like manner the wife of a tenant in fee, if

Dower.

she survives him, has an estate known as dower in one third of the land for her life. These estates will be more fully described in another place,[8] but are mentioned here for convenience.

Rights of a tenant for life.

482. A tenant for life has the same rights of possession and innocent use, including the right to take the fruits, rents

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[7] See § 569. [8] See 977, 979.

and profits of the land, as if he were owner. At common law the rule as to waste was that if the estate was created by the agreement of the parties the tenant might commit waste, unless he was forbidden to do so by the terms of the agreement, because if the grantor did not wish the tenant to have that right he could insert a provision to that effect in the agreement; but if the estate arose by operation of law, the tenant could not commit waste. But by the statutes of Marlbridge[9] and Gloucester[10] tenants for life were prohibited from committing waste; so that now such a tenant has not the right to commit waste, unless the right is conferred upon him by the instrument creating his estate, in which case he is said to hold without impeachment for waste. And even in that case the courts of equity will interfere to prevent him from doing wanton and malicious, or even unnecessary and unreasonable, injury to the property, such as, in ordinary circumstances, felling ornamental trees or needlessly destroying good buildings. This is called equitable waste.

Waste.

Equitable waste.

Waste is either voluntary or permissive. The former consists of acts done by the tenant which are injurious to the inheritance, such as cutting timber or tearing down buildings. Permissive waste is omission on the part of the tenant to take proper care of the property and suffering it to fall into ruin. The acts which a tenant must not or must do will be more fully described in another place.[11]

Voluntary and permissive waste.

The tenant has, however, the right to take from the land, what are called estovers or botes, which consist of wood for fuel, for repairing buildings, for making or repairing fences or agricultural implements and for other like purposes, and other kinds of fuel or building materials found upon the land, such as coal or stones. But such things may only be taken for use on the promises, not for purposes of sale or trade, and only in a reasonable manner, so as not unnecessarily to injure the land. If they are improperly or excessively taken, that is waste.

Estovers.

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[9] 52 Hen. III.

[10] 6 Edw. I

[11] See § 795.

Emblements.

A tenant for life has furthermore a right to emblements.[12] Since he can not tell at what time his estate will come to an end, it would always be hazardous for him to plant crops at the risk of losing them entirely if his estate terminated before he could harvest them. Therefore a tenant *pur auter vie* after the death of the *cestui que vie*, or the personal representative of an ordinary tenant for life after his death, is entitled to have the crops remain in the ground till ripe, and then may enter upon the land, gather and cure them and take them away, in a reasonable manner and time. But if the tenant puts an end to the estate by his own conduct before its natural termination, for instance if he forfeits it by the commission of a crime or the breach of a condition, he shall not have the emblements, for it is his own fault; but his subtenant in such a case is still entitled to them.

Estate tail after possibility of issue extinct.

483. Another kind of freehold estate, intermediate in its nature between an estate in fee and one for life, is that of a tenant in tail after possibility of issue extinct. This arises where a person is tenant in tail special, and it is no longer possible that there ever should be any heir capable of inheriting, as for instance if the land was limited to the heirs of his body by a particular wife and she has died childless. For most purposes the estate is then considered as a mere estate for life, not a fee; but the tenant may commit waste like tenants in tail generally.

General characteristics of freehold estates.

484. All freehold estates are real property. They have the common quality of being indefinite in duration. An estate in land given for a fixed time, however long, *e.g.* an estate for a thousand years, is not a freehold estate, even though the land be freehold land. At common law freehold estates must always be created by livery of seizin, and therefore could not be granted to begin in the future. Livery of seizin was a juristic act that did not admit of *dies*,[13] but must take effect immediately or not at all. A grant of an estate to a man and his heirs to begin at a future time was void at common law. And even after livery of seizin became

Can not commence *in futuro*.

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[12] See § 222. [13] See § 353.

extinct, the rule that a freehold estate could not be limited to begin at a future time continued to survive, though broken in upon by many exceptions.

Estates less than freehold.

485. Estates less than freehold are either (1) estates in copyhold land similar to freehold estates, (2) estates in either freehold or copyhold land which are limited for a fixed time or held precariously, or (3) certain estates created by way of security for debts.

Copyhold estates.

As to the first kind, the customs of manors are not uniform. In some manors estates in perpetuity may be had in copyhold land, which will descend to the tenant's heir, and are practically equivalent to fees, though the heir must still be admitted by the lord; while in others no larger right than an estate for life can exist, the land coming back to the lord on the tenant's death. Estates of inheritance and for life in such lands are reckoned as real property.

Leaseholds.

486. The second class of estates less than freehold comprises estates for years and at will. These are generally created by the letting or leasing of land. Under the old common law the hirer or lessee of land was not considered as having any estate or property right in it at all. He had not even possession, but mere detention or occupancy, being regarded, so far as his relation to the land went, as the servant or bailiff of the lessor. He had nothing but a right *in personam* against the lessor arising out of the contract of hiring. If any third person wrongfully dispossessed him or wrongfully meddled with the land, he had no remedy directly against the wrongdoer, but must look for protection and help to his lessor, who was bound to him by the contract. But at least as early as the reign of Edward IV the lessee came to be looked upon as a possessor, and an action was given to him[14] by which he could recover the possession of the land itself if he was wrongfully deprived of it; and from that time his interest in the land was recognized as being a kind of estate. But these estates were never brought fully under feudal rules; there is no tenure or feudal relation

[14] The action of ejectment; see § 909.

between the landlord and the tenant; the relation on the contrary is simple, business-like and modern in its character.

Chattels real. This class of estates therefore are not deemed to be real property at all, but are personal property. They are said to be personal estates in things real, and are called chattels real, the word chattel here being used, contrary to its ordinary signification, to denote not a thing but a right. They do not descend to the heir of the tenant upon his death, but go to his personal representative.

Estates for years. **487.** An estate for years, also called a term (*terminus*) or a leasehold, is any estate in land which is limited to continue for a fixed time, no matter how long or how short. Thus an estate granted for one month would be in technical legal language an estate for years. The tenant for years is also called a termor. If no other time is specified, the term begins from the time of making the lease; but, as livery of seizin was never necessary, an estate for years may be made to commence in the future. But the term is not vested in the tenant until he enters; till then he has only what is called an *interesse termini*, which is a bare right to acquire the estate by entry, of the same nature as that of the heir or of a person who was ousted from his estate at common law.

Interesse termini.

Quasi-seizin. By entry the tenant does not acquire seizin, because seizin pertains only to freehold estates; but he gets what is called possession, the word possession being here used in a peculiar sense to denote not the possession of the land, although that too is usually gained by the entry, but, like seizin, the condition of having the estate. Sometimes it is called *quasi*-seizin. If the tenant is wrongfully ousted, he loses for the time being his estate, just as does a freeholder in the same case, and has only a bare right remaining; but like a freeholder, he can regain his estate by entry or action.

Ouster.

Rights of tenant for years. A tenant for years has the right of possession and of innocent use and to take the fruits. At common law he could commit waste, but this right was taken away by the statutes of Marlbridge and Gloucester above mentioned. He has a right to estovers, like a tenant for life; but not to emblements, because the time when his estate will end is

Waste.

Estovers.

Emblements.

known beforehand. But if the lessee for years is a subtenant and his estate is liable to be brought to an untimely end by the termination of his lessor's estate, the subtenant shall have the emblements if this happens; *e.g.* if a tenant for life makes a lease of his land for years and dies during the term, by which the term is defeated, in this case the termor is entitled to emblements. In England, however, at present it is provided by statute that in such a case the subtenant, instead of having emblements, may remain in possession till the end of the current year paying a proportionate rent.

Tenant can not dispute landlord's title.

488. A tenant for years, and the same principle applies to a tenant at will next be described, is estopped to dispute his landlord's title. That is, he having received possession from his landlord, it is conclusively presumed against him that the landlord was the owner, and he can not set up any *jus tertii*[15] against his landlord. For instance he can not refuse to pay rent or give up his possession at the end of his term on the ground that some other person than the landlord is the true owner and entitled to the rent or the possession, even if that be the case. But if the landlord's right has come to an end during the term and some other person has succeeded as landlord, for example if the landlord has sold the property, he may acknowledge the rights of the new owner. Also if the landlord is in fact not the owner, and the true owner asserts his rights and the tenant is forced to submit to his claim, the rule does not apply. The tenant is only obliged to acknowledge his landlord's claim so long as the landlord secures him in his quiet enjoyment of the land.

Tenancy at strictly will.

489. An estate or tenancy at will is either strictly at will or from year to year. The former, which is the original kind, is where the holding is precarious, so that either party may put an end to it at his pleasure. The intention to do so may be declared in express words or by any act which is inconsistant with the longer duration of the tenancy, as by the lessor's entering upon the land, making a lease or conveyance of it to another person with a right of

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[15] See § 309.

immediate possession or doing other acts of ownership, or by the abandonment of the land by the tenant or his attempting to assign his rights to another, for the interest of a tenant at will is of such a slight nature that he is not permitted to assign it. Also if the tenant commits waste he loses his estate. The rights of a tenant at will are the same as those of a tenant for years, except that he is entitled to emblements if the landlord puts an end to the holding, but not if he himself does. An estate strictly at will can now only be created, except in a few special cases, by an express agreement of the parties that the holding shall be on such terms. Generally a letting which in ancient times would have made a tenancy strictly at will at present will establish the modified form of tenancy at will known as a tenancy from year to year.

Rights of a tenant at will.

Tenancy strictly at will under modern law.

490. On account of the obvious inconveniences of tenancies strictly at will the custom grew up, which in time acquired the force of law, for either party who wished to terminate the holding to give notice to the other. The general rule is that at least six month's notice must be given, expiring at the end of some year of the tenancy. If such notice is not given, the tenant holds for another year, wherefore his tenancy, though technically ranked as a tenancy at will, is usually called a tenancy from year to year. In the case of the letting of buildings and rooms in towns and cities the notice, by custom or statute, is generally shorter, most often a month, so that the holding is sometimes called a tenancy from month to month. There may even be a tenancy from week to week.

Tenancy from year to year.

Tenancy from month to month.

491. If any tenant of land, for instance a tenant *pur auter vie* or for years, holds over after his estate has terminated, with the consent of the person entitled to the possession, he becomes a tenant from year to year; and the same is true even though he holds over wrongfully, if the landlord elects to treat him as such.

Implied tenancy from year to year.

If however a tenant holds over wrongfully, and the party entitled to the possession does not choose to take him as a tenant from year to year, he is still not regarded as a

Tenancy on suffrance.

mere intruder or trespasser, but as a kind of tenant. He is in a situation analogous to that of a person who has ousted another, having not merely the physical possession of the land but a right, though a defeasible right, in it. This is a tenancy at sufferance, and may be put an end to at any time by entry or action by the rightful possessor. There can be no tenancy at sufferance, however, against the King, or in the United States against the state, but the party holding over is a mere trespasser. A tenant by sufferance is now bound to account for the rents and profits of the land for the time that he holds it.

Estates as security for debts.

492. The third kind of estates less than freehold are certain estates created by way of security for debts, which will be described in another place.[16]

Merger.

493. If two different estates in the same land come into the hands of the same person with no estate between them, the smaller estate is merged or lost in the larger and ceases to exist, and only the larger remains. Thus if a tenant in fee should let the land to his son for a term of years, and should then die and the fee should descend to the son as his heir, the term would merge in the freehold, and the heir would not be both tenant in fee and tenant for years, but only tenant in fee. The same would be the case if a tenant for life should buy the fee and have it conveyed to him; the life estate would be merged in the fee. But if a tenant for life should let his land for ten years, and then the termor should obtain the fee during the life of the tenant for life, the term would not merge in the fee, because the estate of the tenant for life would come between them. Any freehold estate is regarded as a greater estate than any non-freehold estate. Therefore if a tenant for a thousand years should acquire an estate for life in the land, the term would merge in the life estate, and the tenant would hold the land only for his life and would lose the residue of his term. But a fee tail does not merge in a fee simple, because that would destroy the rights of the heir

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[16] See Chapt. XXXV.

in tail, contrary to the intent of the statute *de donis.* Nor does merger take place when the two estates are held in different capacities, *en autre droit,* as where a tenant for years dies and makes the tenant in fee his executor, so that the term vests in the latter, because the tenant in fee *qua* executor is a different person legally from himself in his individual capacity.

Estates held *en auter droit.*

Several, joint and common estates.

494. Estates as well as other kinds of rights may be several, common or joint.

Rights of co-tenants.

Co-tenants have an equal right to the possession of the land; and if one is in possession alone it is *prima facie* presumed that he holds for the benefit of all and that his possession is not adverse to the others, so that he can not by means of it acquire any exclusive rights against them. Nor can he have any action against another co-tenant who enters upon the land. But one co-tenant may in fact oust the others and hold adversely to them, if he actually excludes them against their will. One tenant who merely occupies and uses the land and takes the crops from it with the acquiescence of the others is not bound to pay them rent. And even if he received rents or profits from the land, he was not at common law bound to account to them for their shares, except by agreement. But by various statutes he is now obliged to account; and if he excludes them from their proportional use of the land against their will, they may have actions against him to recover the use of the land and damages. One co-tenant is also liable to the others for waste committed by him.

Ouster.

Rights of use.

Waste.

Joint actions.

Joint tenants must sue and be sued jointly in matters affecting their joint estate, but this rule does not generally apply to tenants in common.

Repairs.

At common law one co-tenant could compel the others to contribute to the cost of necessary repairs upon the property, but not of improvements, by means of a writ *de reparatione facienda.* But that writ is now obsolete, and the authorities are in conflict as to whether an action will now lie for contribution.

Alienation by one tenant.

Although one tenant may alienate his share, yet he can not alienate any specific part of the land by metes and bounds,

so as to make the alienee tenant in severalty of that part. For example if A and B are co-tenants of land in equal shares, A may sell and convey to C his half; but only one undivided half, not a specific part such as the north half.

Partition

One tenant had at common law no right against his co-tenants to partition, that is, to have the land divided and each one's part given to him in severalty. But they could make partition by mutual consent. At present by statute there is a right of partition on the demand of any tenant, and if the property can not be divided, as in the case of a house, the court will sell it and divide the price.

Coparcenary.

495. There is one species of joint tenancy that pertains exclusively to estates of inheritance. When the tenant of such an estate dies leaving as his heir not a single person but a group of persons, the property is not divided among the heirs in severalty but they succeed to the whole jointly. This kind of joint tenancy differs from ordinary joint tenancy in three respects. (1) There is no right of survivorship attached to it, so that if one of the joint tenants dies his share goes to his heir not to the other co-tenants. (2) The rights of the co-tenants need not be equal; one may have a larger share than another. (3) Each heir had at common law a right to partition, for which reason this kind of tenancy is called tenancy in coparcenary, and the heirs coparcenors or parcenors.

Estates in possession and in expectancy.

496. Estates are divided into estates in possession[17] and in expectancy. An estate of the former kind is one where the tenant has a right of present use and enjoyment of the land; this is the ordinary sort of estate. But where the estate is in expectancy the tenant has no present use or enjoyment, but will or may have it at some future time, upon the termination of some other estate which is called a particular estate. Thus if A is tenant in fee simple, and grants the land to B for life, B has an estate in possession,

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17 The word possession is here used in a peculiar sense. It does not denote possession of the land, nor simply the *quasi*-possession of a right, but the *quasi*-possession of a right that may be presently enjoyed.

he may at once occupy and use the land; but A, although still tenant in fee simple, has only an estate in expectancy, he can not possess or use the land so long as B's life estate, which is the particular estate upon which his estate is expectant, endures, but after B's death the land will revert to him again and his fee simple in expectancy will again vest in possession.

A present estate.

An estate in expectancy is a present estate, though only to be enjoyed in the future. It must be distinguished from a mere possibility, such as the chance of regaining land by the tenant's breach of a condition subsequent, which is not an estate at all.

The ultimate fee simple.

Since the fee simple of land must always exist and be held by some one, any estate other than a fee simple, even a fee tail, is always a particular estate only, behind which lies the fee simple in expectancy. There may be a succession of estates in expectancy, each of which is a particular estate as to those that follow it. Thus A may hold at will as a subtenant to B who has an estate for years, after whom C is tenant for life in expectancy, D having an estate tail expectant on the termination of C's life estate, while E has the ultimate fee simple.

Reversions.

497. An estate in expectancy is either a reversion or a remainder. A reversion exists where a person who has an estate in land grants to another a less estate,[18] retaining himself his former estate thus reduced to the condition of an estate in expectancy. For instance if A, being seized in fee or for life, gives to B an estate for years, or himself having an estate for years, gives to B an estate for a shorter term or at will, the right which A continues to hold is a reversion. The reversioner does not acquire his reversion at the time when the particular estate is created, though it only begins at that time to be called a reversion; it is what is left to him of what he had before.

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[18] A less estate means an estate which is less in right, not an estate in a smaller piece of land. If A, holding eleven acres, grants five acres to B retaining six acres, there is no reversion.

498. A remainder is where a particular estate is given, and at the same time and by the same juristic act an estate in expectancy upon it is given to another person. Thus if A, being seized in fee simple, gives an estate for years to B by deed, and at the same time and by the same deed gives another estate to C expectant upon the termination of B's estate, C has a remainder. If the estate given to C is the fee simple, then that fee, which if it had continued vested in A would have been a reversion, becomes in C's hands a remainder, and there is no reversion; but if C's remainder is merely an estate for life or years, then the fee simple, which A still holds, is a reversion. A remainder differs from a reversion in not being something left over to the remainder man when the particular estate is created, but being acquired by him at the same time that the particular tenant acquires his estate. By one juristic act only one reversion can be formed; but any number of remainders may be created, with or without a reversion behind them. For instance A by one and the same deed may give an estate for years to B, with remainder to C for years, with remainder to D for his life, with remainder to E for his life, with remainder to F in tail, and may keep the fee simple himself as a reversion or give it to G as an ultimate remainder. When at common law a freehold remainder was granted, livery of seizin was made to the particular tenant for the benefit of the remainder man and, if the particular estate was itself a freehold, for his own benefit also.

Remainders.

Successive remainders.

Livery of seizin.

The following rules were applicable at common law to remainders.

1. There could be no remainder without a preceding particular estate, which was said to support the remainder. If an estate was given to commence in the future without any particular estate before it, it was not a remainder; and a freehold estate could not be so given.[19] But an estate at will can not support a remainder, being considered too slender and precarious for that purpose.

There must be a particular estate.

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[19] See § 484.

Particular estate and remainder must commence at the same time.

2. The remainder must pass out of the grantor at the same instant with the particular estate. If A, tenant in fee, grants an estate for life to B, and half an hour afterwards grants the fee to C, C does not take a remainder, but what he gets is the reversion which continued in A after the grant to B.

When the remainder must vest in possession.

3. The remainder must vest in possession immediately upon the termination of the particular estate. If there is any gap between them, however small, the remainder is lost. Thus if an estate be limited to A for life with remainder to the eldest son of B, and A dies before any son is born to B, the remainder fails, and even if B afterwards has a son, the son can not take the estate.

Vested and contingent remainders.

499. Remainders are either vested or contingent. A vested or executed remainder is one where the remainder man is known, and is certain to come into possession if he lives long enough or could immediately come into possession if the particular estate should at once terminate. A contingent or executory remainder is one where either the person who is to take in remainder is not known or his coming into possession depends upon an uncertain event which may not happen before the termination of the particular estate, so that if the particular estate should immediately terminate there would be no remainder man who could take in possession. But a remainder which begins as a contingent one may vest during the continuance of the particular estate. Thus if land is given to A for life with remainder to B in fee, B's estate is a vested remainder. The remainder man, B, is known, and if he outlives A he will certainly take in possession, or if A should die at any time B could come in. So if land is granted to A for years with a remainder to B for life, the remainder is vested in B, because if he lives long enough, *i.e.* till the end of the term, he will get the land, although he may die before, and so never come into the actual enjoyment of his right; and this is true even though the term is for so long a time that there is no possibility of B's living to see its ending, *e.g.* if it is for a thousand years. Still he has a present estate in the land by way of remainder. But if land

is given to A for his life with a remainder to the eldest son of B, who has no son, the remainder is contingent, though as soon as a son is born to B during A's lifetime it will vest in him and be no longer contingent. If, however, the particular estate were for A's life and the remainder to the eldest child of B who should be living at the time of A's death, the remainder would be contingent through the whole duration of the particular estate, even though B had children at the time of the grant, because it could not be known which of the children would outlive A. So a remainder limited to B provided he marries a certain woman is contingent until the marriage takes place, though the only possible remainder man is known from the first.

Remainder to an uncertain person.

Remainder depending upon an uncertain event.

If a contingent remainder is limited to a class of persons some or all of whom are not in being, *e.g.* to all the children of a man, as soon as any one of them is born the remainder becomes vested in him, but, as the expression is, will open and let in the others as they are born.

Contingent remainder to a class.

500. A contingent remainder, so long as it continues to be contingent, is not a present estate like a reversion or vested remainder, but is a mere possibility. But, as already explained, the estate in remainder must by the general rule pass out of the grantor at the same time with the particular estate. What then becomes of it before the remainder vests? This question, which seems to be purely theoretical, was answered by the old lawyers by saying that the remainder was in abeyance, *in nubibus* or *in gremio legis*, expressions which do not seem to convey any very definite meaning. In fact the case of a contingent remainder seems to constitute an exception either to the rule that the remainder must pass out of the grantor at the same time with the particular estate or, if it be a remainder in fee simple, to the rule that the fee simple must always be vested in some one.

A contingent remainder a mere possibility.

The fee in abeyance.

But although the fee simple may perhaps in this one case be in abeyance, the entire freehold can not. There must always be an existing tenant of the freehold, for whose benefit livery of seizin could be made. Therefore if a contingent remainder is a freehold, the particular estate must be a freehold also.

When the particular estate must be a freehold.

An estate for years will not support a freehold contingent remainder, because there is no person for whose benefit livery of seizin could be made. It could not be made to the particular tenant for his benefit, because a term for years can not be given by livery of seizin, nor to him for the benefit of the remainder man, because there is as yet no estate in remainder to be conveyed by livery, but only a possibility. But if the particular estate is itself a freehold, livery could be made to the tenant of that.

When the remainder must vest.

501. Since a contingent remainder must vest in possession at the instant when the particular estate determines, it must necessarily vest in right, *i.e.* cease to be contingent, either at that time or earlier. Therefore if the particular estate comes to an end before the happening of the contingency upon which the remainder depends, the remainder is defeated or destroyed, and the land reverts to the donor.

Termination of the particular estate.

The particular estate may terminate either by its own natural expiration, as when the tenant for life dies, or it may be prematurely put an end to by the tenant's surrendering it or forfeiting it by various kinds of misconduct, as will be hereafter explained. In the latter case if the remainder is so limited that it can not vest until the expiration of the time originally limited for the duration of the particular estate, it will be defeated. To guard against a defeat of the remainder by a premature ending of the particular estate, it was formerly customary to insert between the particular estate and the contingent remainder a vested remainder in trustees for the period of the normal duration of the particular estate. Then if the particular estate was surrendered or forfeited, the vested remainder at once took effect in possession and served to support the ultimate contingent remainder. For example, if land were given to A for his life with a remainder in fee to his wife if she survived him, A could defeat his wife's contingent remainder by forfeiting his estate in his lifetime. The particular estate would thus come to an end, and the time for the vesting of the remainder would not have arrived. But if the gift were made to A for his life, remainder to B and C in trust for A during A's natural life, remainder to

Trustees to preserve contingent remainders.

the wife if she survived her husband, a forfeiture of his estate by A would not defeat the remainder to the wife, because the remainder to B and C would at once take effect in possession and the contingent remainder would vest immediately upon the termination of that estate at A's death, so that no gap would occur between the successive estates. B and C in such cases are called trustees to preserve contingent remainders. But it has now been provided by statute that a premature destruction of the particular estate shall not cut off a remainder, so that trustees to preserve contingent remainders are no longer necessary.

Such trustees not now necessary.

502. Besides the above mentioned kinds of estates in expectancy, which exist under common law rules, there are others which are created by what are called executory devises[20] in wills. When wills of land were introduced it was not thought necessary, as has been said, to apply to them all the strict rules of the old feudal law; and particularly livery of seizin was impossible in a gift by will, so that the reason for not permitting a freehold estate to be limited to commence in the future did not exist. Accordingly by a will a freehold estate may be given to commence in the future without any particular estate to support it, the land in the mean time descending to the heir. For instance an estate in fee or for life may be devised by will, though it could not be given by deed, to an unmarried woman to take effect upon her marriage; if she never marries, the estate will never vest at all but the heir will keep the land. Also a remainder, or a right resembling a remainder, may be limited by will after a fee simple, which can not be done by deed; that is, an estate in fee simple may be given to one person with a provision that in case the estate is defeated in any manner the land shall go to another person designated in the will instead of coming back, as would otherwise be happen, to the heir of the donor. By executory devise also a term for years may be given to a person for his life with a remainder over which could not be done at common law,

Executory devises.

Freehold estates commencing *in futuro*.

Remainder after a fee simple.

Life estates in a term.

[20] Devise means a gift of real property by will.

because, a life estate being deemed a greater estate than a term, the first grant of it for life was construed to carry the whole term, leaving no remainder. Thus if a man has an estate for a thousand years, he may by will create life estates and remainders in it as though it were a fee simple. These estates in a term, though resembling freehold estates, are not of course really such, being all derived out of the term.

The rule against perpetuities.

503. But contingent dispositions of property must be so made as to vest within a certain time fixed by law. As long as the right is contingent it is inalienable, being a mere possibility; a possibility can not be assigned. But the law will not permit property to be tied up so that it can not be alienated forever or for an unreasonably long time. The undue suspension of the vesting of a right is called a perpetuity, and is forbidden by the rule against perpetuities. This rule as laid down by the courts was that an estate must vest within the duration of some life or lives in being and twenty one years thereafter. The period is reckoned from the time when the instrument conferring the right takes effect, *i.e.* from the delivery of the deed, or from the death of the testator if the gift is by will. Thus a man may limit an estate to the son thereafter to be born of his brother, if the brother is living at the time of the gift, to vest when the son reaches the age of twenty one; but a gift to the son of that yet unborn son would be void. However, in the application of this rule an additional allowance of time may be made for the period of gestation. Thus in the above example if the brother should die leaving his wife pregnant with a son, the son being afterwards born could take the gift when he reached the specified age, though that might be a few months more than twenty one years after the death of his father who was the life in being at the time of the gift. So a child *in ventre sa mere* at the time of the gift may be reckoned as a person then in being.

Thelluson's case.

Thelluson's case[21] led to a change in the law. Peter Thelluson, a wealthy merchant, left by will the bulk of his

[21] 4 Ves. 227, 11 Ves. 114.

large fortune to trustees to be accumulated during the lives of his three sons and during the lives of all their sons living or *in ventre sa mere* at the time of his death, who would then be the lives in being. At the death of the last survivor of them the property was to be divided into three parts and one part was to go to the eldest male lineal descendant of each son, and upon failure of such descendant of any son his share was to go to the descendants of the other sons. This will was held valid. But by a statute of 39 & 40 George III gifts of property to be accumulated for a longer time than the life of the donor and twenty one year thereafter, with allowance for the period of gestation, are declared void, with certain exceptions. In all of the United States there are rules against perpetuities, sometimes statutory and sometimes independent of statute, most of which are substantially like the English rule.

Modern law as to accumulations.

American law.

CHAPTER XXX.

USES.

Mortmain.

504. Land held by a corporation is said to be held in mortmain (*in mortua manu*).[1] In the two or three centuries following the Norman conquest a large part of the land of England passed into the hands of ecclesiastical corporations, partly by sale and partly by gift from donors induced by motives of piety or superstition. This was very displeasing to the feudal lords, because they thereby lost a great part of their feudal dues. As the corporation never died, there were none of the profits which arose to the lord on the death of a tenant, and much of the land was held in frankalmoign practically freed from services.

Statutes of mortmain.

Accordingly certain statutes were passed in the reigns of Henry III and Edward I, which are known as the statutes of mortmain, to prevent the acquisition of land by corporations. The effect of those statutes was that if lands or tenements were conveyed in mortmain without a license from the King and the lord, they should be forfeited to the lord, or if he omitted for a year and a day to enforce his forfeiture, to the superior lords successively, and in default of them all to the King. In most of the United States these statutes are not regarded as in force.

Evasions of the statutes.

The ingenuity of the lawyers, who in early days were mostly ecclesiastics and naturally inclined to favor the church, found various ways of evading the statutes of mortmain. Among others they invented common recoveries, by which the land was in form recovered under an old right.[2] But by far the most important in its consequences of their inventions was that of uses.

Uses in Roman law.

505. Use (*usus*) in the Roman law meant a right in one person to occupy and use a thing belonging to another It was classed as a kind of servitude,[3] the usuary, or person having

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[1] Perhaps because the chief landholding corporations in ancient times were monasteries composed of monks who were civilly dead; but a variety of other opinions as the origin of this expression have been put forth.

[2] See § 598. [3] See § 511.

the right, not being deemed to have juridical possession of the thing but merely detention or natural possession. Usufruct (*usus-fructus*) was a very similar servitude, which however included the right to take the fruits or profits of the thing. These rights, like estates which they greatly resembled, might be given to a person for his life, for a fixed time or at will or so as to descend to his heirs. Usufruct.

Moreover the Roman law had another kind of right known as *fidei commissum*, which was where property was given to a person by will, so as to make him the legal owner if it, but he was directed to hand it over to another person. This direction was binding upon him. *Fidei commissum.*

The ecclesiastical lawyers were largely students of the Roman law, on which their own ecclesiastical law was in great part based, and it is generally supposed that it was from the provisions of that law in regard to uses and *fidei commissa* that they borrowed the doctrine of uses which they succeeded in introducing into the common law, though in a much modified form. Uses perhaps borrowed from the Roman law.

506. When a person desired to convey an estate to a corporation and yet not to expose it to forfeiture under the statutes of mortmain, instead of conveying it directly to the corporation itself he conveyed it to some third person, known as the feoffee to uses, directing him to hold it to the use of the corporation. The corporation was called the *cestui que use*. If the feoffee complied with the direction of the donor, the corporation, though it did not become the legal tenant of the land, and so incurred no danger of forfeiture, got all the benefit of the land as if it were tenant. The use was entirely void at law. The courts of common law would not enforce it or take any notice of it, but treated the feoffee to uses in all respects like an ordinary tenant. He alone was bound to perform the services to the lord, and the estate would escheat or be forfeited by failure of heirs or misconduct on his part. No one but he could bring any action for the possession of the land or for any injury to it. He was entirely at liberty to disregard the donor's direction and to appropriate the land to himself; if he suffered the corporation to have possession, it was merely as his tenant at will whom he could expel whenever he chose. Uses in the English law. Uses void at law.

s enforced equity.

But here the Chancellor, who at that time was always a priest, interposed for the relief of his clerical brethren, and enforced those uses in his court of Chancery, compelling the feoffee to uses to observe the directions of the donor. Thus was introduced into the law the conception of a double system of rights or property, the legal estate, existing by virtue of common law rules and recognized and protected in the courts of common law, and the use, which was a purely equitable estate, ignored by the common law and enforced and protected only in a court of equity. This equitable right, it will be observed, was a right *in personam* merely, a right which the *cestui que use* had against the feoffee to uses only; as to all other persons the latter stood as the owner. The right was a claim against the feoffee to have him exercise his legal right in a particular way, because equity and good conscience required him to do so and it would have been a fraud[4] on his part to keep the land and not do so.

ouble sys- of rights.

Uses were ights *in* ersonam.

Extensive nployment of uses.

507. Uses, having been thus introduced in the reign of Edward III, were found convenient by many other persons than religious corporations, largely because of their freedom from feudal rules and restrictions, and lands were conveyed to the use of private persons. So by about the reign of Edward IV the court of Chancery began to reduce the rules regarding uses to a regular system.

Against whom the use was nforceable.

It was held at first that the use could be enforced in equity only against the feoffee to uses himself; but afterwards it was decided to be good against his heir or against an alienee of his who took the estate from him without consideration or with notice of the use; but a *bona fide* purchaser from him for value, not knowing of the use, took the estate free from the use.[5]

The use reated as property.

The use was treated in the courts of equity as a kind of property, and to a considerable extent the same rules were applied to

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[4] Not at first fraud in the strict legal sense, because legal fraud implies the breach of a legal duty, and the very ground for the interposition of the Chancellor was that there was no legal duty; but morally fraud. However, after the rule of enforcing uses had become established, there was an equitable duty, the breach of which was then properly called fraud. See § 312, 319.

[5] See § 271.

it as in courts of law to ordinary property. The most important points to be noticed are the following.

In what uses can be created.

Since a use implies that some other person has a legal property right which includes the right of possession, no use can be created in a thing of which the use is inseparable from the possession or *quasi*-possession, such as an incorporeal hereditament.[6]

Estates in uses.

Any estate or kind of right which can be created in ordinary property can be created by way of use; thus land may limited to the use of a man and his heirs or for life, for years or at will, just as it might be given to him directly on the same limitation. And uses are real or personal property accordingly as similar estates directly in the land would be. But uses are not held on tenure, and are therefore not subject to the incidents of tenure such as escheat to the lord. Nor was livery of seizin or entry by the *cestui qui use* ever necessary to vest the use in him. Strictly and technically he had no seizin either of the use or of the land; the seizin was in the feoffee to uses. Curtesy and dower were not at first permitted in uses; for which reason it became common to settle lands to the use of the husband and wife jointly for their lives with a use in the nature of a contingent remainder to the survivor of them, which was called a jointure. A use also could not be taken by legal process for the debts of the *cestui que use*.

Tenure.

Seizin.

Curtesy and dower.

Jointure.

Uses could not be seized for debts.

Disadvantages of uses.

508. Notwithstanding the convenience of uses they were found to be open to some objections, not the least being that by their means the statutes of mortmain were successfully evaded, surviving husbands and wives were deprived of their curtesy and dower, and lords of their feudal dues. To obviate those difficulties various statutes were passed, all of which showed a tendency to treat the *cestui que use* as the real owner, until at last a decisive step was taken in the statute of uses, otherwise called the statute for transferring uses into possession, of 27 Henry VIII. This enacted that whenever a person should be seized of lands or tenements to the use of another, the *cestui que use* should have a legal estate corresponding to his use. In other words, it annihilated the estate of the feoffee to uses, making

The statute of uses.

Execution of the use.

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[6] See Chap. XXXI.

of him a mere channel through which the estate passed to the *cestui que use*, and transformed the right of the latter from a merely equitable into a legal estate, thus removing it from the jurisdiction of the courts of equity into that of the common law courts, and bringing it under the statutes of mortmain. Therefore if after that statute A was enfeoffed to the use of B, A took nothing at all, he became a merely nominal party, and B took the same legal estate as if the feoffment had been made directly to him. This was called executing the use.

Seizin of the *cestui que use*.

When a use is executed the *cestui que use* gets not merely a bare right but the estate, the seizin, so that it is not necessary for livery of seizin to be made to him or even for him to enter in order to be fully seized. But the statute only executed the use when the feoffee to uses was "seized" to uses, that is, only when the estate conveyed to him was a freehold estate. In other cases, *e.g.* if a lease for years be made to A to the use of B, the use still remains a mere equitable right.

What uses were executed.

Estates in expectancy by means of uses.

509. By means of uses certain kinds of estates in expectancy can be created which could not be at common law. Livery of seizin not being necessary, a freehold use can be created by deed to commence in the future without any intermediate particular estate. This is called a springing use, because it will spring up and begin to exist when the appointed time comes. Thus a grant of an estate in fee to an unmarried man to commence at his marriage would be void at common law. But a grant to his use in fee as soon as he marries is good. Until the marriage the use results to, that is, remains in, the grantor himself and the deed has no effect; but as soon as the *cestui que use* marries the use to him springs up and is executed, and he becomes seized in fee without any farther act on his part.

Springing uses.

Shifting uses.

A shifting or secondary use is where a use is limited which is to come to an end upon the happening of some event, either certain or contingent, and a new use is to arise in its place; that is, the use is to shift from one person to another. By this means a remainder may be created after a fee simple, which could not be done at common law. For instance an estate may be conveyed to the use of A and his heirs, thus giving

A an estate in fee simple, but if B marries, then to the use of B and his heirs, where the use to B resembles a contingent remainder. As soon as B marries A's estate terminates, and B becomes seized in fee.

CHAPTER XXXI.

INCORPOREAL HEREDITAMENTS

Incorporeal hereditaments.

510. There are, as has been already remarked,[1] a few kinds of rights, mostly in land or connected more or less directly with the use of land, which are themselves regarded as a sort of incorporeal things capable of being the subjects of property rights. These are called incorporeal hereditaments. They are classed among things real, they may be held on tenure, and the rights which may be had in them are estates. The incorporeal things, through rights in land, are not themselves estates; but the same kinds of estates exist in them as in land, and like estates in land are divided into freehold and less than freehold, the former being real and the latter personal property. Considered as being themselves rights in land, these incorporeal hereditaments are of the nature of normal property, but estates in them are abnormal property, since their subjects are not material things.

Easements.

511. The most important incorporeal hereditaments are easements. Every estate in land includes a right of present or future possession of the land. An easement, on the other hand, is a right to use or enjoy land without having possession of it; as where A has a right of way over B's land or a right to pasture his cattle upon it. The rights most resembling easements in the civil law are called servitudes or *jura in re aliena*, and those names are sometimes used in the common law. Often, but not always, a distinction is made between the words easement and servitude, the former being used to denote the right considered as a benefit to the holder of it and the latter to denote the same right considered as a burden upon the land subject to it. Thus A is said to have an easement in B's land, and the land to be subject to a servitude in A's favor.

Servitudes; *Jura in re aliena.*

Profit a *prendre.*

Easements sometimes consist in a right to take the fruits of land or to take a portion of the land itself; as where A has a

[1] See § 217.

right to cut grass or to take stones from B's land. Such a right is called profit *a prendre*.

Negative easements.

On the other hand an easement may comprise no right of active use, of use in the proper sense, but merely a right that the land shall not be used by others in certain ways. Thus A may have a right to have his land supported by B's land, in which case B or any one else must not excavate on the latter land so as to cause A's land to cave in, but A has no right to do any act on B's land. These rights are negative easements.

Natural easements.

Easements generally have to be acquired by the holder, for instance by grant from the owner of the land or by adverse possession.[2] But there are certain kinds which exist as a matter of course and do not have to be specially acquired, which are known as natural easements. The right to support for land in its natural condition is an easement of this kind; whenever two pieces of land lie side by side each must support the other; and so are certain rights in water to be hereafter described. It is sometimes said that these rights are not easements at all, but natural rights. However, they differ from ordinary easements not in their nature but only in the way in which they come to exist, and should properly be classed with easements.

Easements appendant.

512. Easements are either appendant, appurtenant or in gross. An easement appendant is one which a tenant of a manor, by virtue of being such tenant, is entitled to enjoy in the common land of the manor or sometimes in the lands of other tenants. These easements depend upon the customs of manors. They do not, of course, exist in the United States.

Easements appurtenant.

An easement appurtenant is one that is annexed to the tenancy of a particular piece of land and can only be held by the tenant of that land; if the land is transferred, the easement goes with it and can not be separated from it. Thus if A has a right of way from his house across B's land to a street, or a right to draw water from B's well for the supply of his house or to have his house drain run across B's land, the easement is attached to the house, A can only have it so long as he continues in possession of the house, and if he conveys or

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[2] See § 592.

minant and servient enements.

lets the house to C, C has the easement also. The land for whose benefit the easement exists is called the dominant land or tenement, and the land which is subject to the easement the servient land or tenement. An easement appurtenant must be connected with or subservient to the use of the dominant land. Thus the owners of a canal might grant to a person as an easement a right to use pleasure boats on their canal, but they could not make that right appurtenant to a house at a distance from the canal with the use of which the boats had nothing to do. If however a merchant had a warehouse on the bank of the canal, an easement to use the canal for the purpose of bringing goods to the warehouse might be made appurtenant to the latter.

What easements can be appurtenant.

Easements in gross.

An easement in gross is one which is not appurtenant to any land, but belongs to the holder personally, such as the above-mentioned right to use pleasure boats on a canal. There is no dominant but only a servient tenement. A negative easement or a natural easement can not exist in gross; though the owner of land may bind himself by contract to permit another to use it, or not to use it himself, in a particular way. Such a contract, however, creates a mere obligation, a right *in personam* against the contracting party, not a property right in the land, whereas a true easement is a right *in rem* in the land; *predium, non persona, servet.*

Easements nd contract rights.

Contents of easements.

Any way or combination of ways of using land, not involving the possession of it, may be made into a separate easement. But there are certain common sorts of easements that have special names and call for particular notice.

Commons.

513. Common is a general name for all such rights of use in another person's land as tenants of manors or townships usually have in the common lands of the manor or township; although this kind of easement is by no means confined to common lands. The most important kinds of common are as follows.

Common of pasture.

Common of pasture is a right to pasture one's cattle upon another's land. When the right is appendant, it is usually confined to what are known as commonable beasts, that is, beasts of the plow and sheep; and the stint of each tenant, *i.e.* the number and kind of beasts which he may turn in and how long he may

keep them there, is usually regulated by the custom of the manor. Common without stint or without number is a right to put in as many cattle as are levant and couchant on the commoner's land, that is, as many as his land can keep and maintain in the winter when there is no pasturage. When two commons lie side by side and open to each other, it is not wrongful if beasts turned into one stray into the other, and this is called common because of vicinage; but either party may fence against the other's beasts. In England the lord of a manor may enclose a part of the waste and appropriate it to his own use, provided he leaves enough to satisfy the tenants' rights of common. This is called approving Also various statutes, known as enclosure acts, have been passed to facilitate the appropriation of commons to individual use, by which means most of the common lands in England are gone or nearly gone. Many of the old townships in the United States had common lands, but in most if not all cases these have been disposed of to individual owners. Common of pasture may be apportioned, that is, if the dominant tenement be divided the easement may also be divided, but not so as to increase the burden upon the servient land.

Common by vicinage.

Approving.

Enclosure acts.

Commons in the United States.

Apportionment.

Common of piscary is a right to fish in another person's water, and common of turbary a right to cut turf for use as fuel in a house. The latter must be appendant or appurtenant to a house.

Common of piscary and turbary.

Common of estovers is the right to take estovers or botes[3] from another's land. This can not be apportioned, and if the dominant tenement is divided by act of the parties the right is extinguished. If it devolves upon several joint tenants by operation of law, as by descending to coparceners, the right to estovers is suspended until it again comes into severalty. The reason is that to divide the right would increase the burden. The right which a tenant for life or years has to take estovers from his own land is not an easement but a part of his estate.

Common of estovers.

Apportionment.

514. A right of way is a right to pass over another person's land It may be a right to pass only on foot, or may include the passage of animals or vehicles, for some special purpose or for all

Ways.

[3] See § 482

purposes. If it is appurtenant to land, as it usually is, not only the tenant himself but his family, servants, and guests and persons who come to the dominant land by his permission or on business with him may generally use it, and if the dominant land is divided the way pertains to each portion of it. The holder of the easement may also, by himself or his servants, enter upon the servient land, in a reasonable time and manner, to make and repair the way. If a man grants to another a piece of land entirely surrounded by land of the grantor, so that there is no way of getting to the former land except by crossing the latter, he impliedly grants him also a right of way across the latter land. This is called a way of necessity. But it must be a strict necessity; such a right of way will not be implied merely because that is the most convenient or the only convenient way of reaching the granted land, if access can at all be had by another route. The owner of the servient land may locate the right of way; but if he omits to do so, or locates it in an unreasonable place, the holder of the easement may locate it.

Ways of necessity.

Support.

515. Support is the right to have land or buildings supported by adjoining land, or by the subsoil when that belongs to a different person from the tenant of the surface. The right of support for land in its natural condition is a natural easement; but if land is artificially burdened by placing buildings or other heavy things upon it, there is no natural right for the support of the additional weight. If A excavates in his land near to B's, and so causes B's house to fall, he has not violated B's natural easement of support unless the excavation is such as would have caused the land to cave in had it been free from the weight of the building. But an additional easement for the support of buildings may be acquired by grant or prescription.

Light and air.

516. Light and air is the right to have adjacent land kept open and unobstructed so that light and air can come to the windows of a house. In cities, where the owners of land frequently build close to the edge of their land and put windows in their houses overlooking their neighbor's land, this right often becomes important. Only a substantial obstruction of the light is a violation of this right; and the present English rule is that the building on the servient land must not exceed in height one half of its distance

from the window. This is not a natural easement. It can be acquired in England by grant or prescription; in the United States only by grant. When it is acquired by prescription the windows are called ancient windows. When it does not exist, the owner of land may build upon his land without regard to how much he thereby blocks up his neighbor's windows; indeed he may build a wall or fence, if he chooses, for the express purpose of blocking them up, and even for no reason but a malicious design to annoy or injure his neighbor.

Advowsons and tithes.

517. Advowsons[4] and tithes,[5] which have already been mentioned, are incorporeal hereditaments.

Offices.

518. At common law certain public offices and also certain offices which were not strictly public, such as that of a bailiff or steward of a manor, were regarded as a kind of property. But in the United States there can be no property right in a public office, at least in most of the states, and this is now the general rule in England.

Dignities.

519. Dignities are titles of nobility and honor, and are classed among incorporeal hereditaments. The English titles of nobility in the order of their rank are duke, marquis, earl, vicount and baron. Earl is the most ancient of all, running back to Anglo-Saxon times. The earl was formerly the chief officer of a county.[6] The equivalent title in most European countries is count (*comes*); and even in England when the title is borne by a woman it takes the form of countess. The origin of baron has already been explained.[7] Every noble of higher rank also holds the title of baron. In ancient times a baron was necessarily a tenant in chief of the King, and his estate, to the holding of which the title was attached, was also called a barony. The name barony is sometimes so used at present, though now both earl and baron have ceased to be territorial titles. The other titles are arbitrary creations of the kings. Duke is *duces*, a general name in Latin for a leader or commander. A marquis was at first a noble settled upon the marches or frontiers of the kingdom to protect it against inva-

Earl.

Baron.

Duke.

Marquis.

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[4] See § 118. [5] See § 119.
[6] See § 93. [7] See § 63.

Vicount. sions. The title vicount is from the Latin name for sheriff.[8] All these dignities are hereditary. The wife of a nobleman takes her

Families of nobles. husband's title; but his children during his life do not. If a woman is a peeress in her own right, she does not impart her rank to

Prince. her husband. The title prince is confined to the immediate family of the monarch.

Knight and baronet. Knight, vavasour and baronet, entitling the person to prefix "Sir" to his name, are titles of dignity and honor but not of nobility. The first is very ancient, and not hereditary. The second is long since extinct. The third is modern, having been first created by James I, and is hereditary.

Esquire. Esquire is said to be a title of worship but not of dignity. It seems at one time to have had a fixed legal meaning, but at

Gentleman. present is assumed by any one who chooses. Much the same may be said of the name gentleman.

Rights of nobles. Besides the right of sitting in the House of Lords, the peculiar legal rights of a nobleman seem at present to be of no great importance. The value of a title is social rather than legal.

Monopolies. **520.** A monopoly is an exclusive right to do some act which but for the monopoly would be legally possible and lawful to be done by any one. Thus the East India Company had for some time a monopoly of the trade with India. In former times the Crown obtained a considerable revenue by granting monopolies of various kinds to individuals for money. At present monopolies are looked upon with disfavor, and are only permitted in a few cases when they appear to be for the public benefit. Thus patents on new inventions and copyrights are in the nature of monopolies, but are just and beneficial, being granted for the purpose of securing to persons the fruits of their own mental labor. Monopolies may be either real or personal property. At present they are generally personal; but if granted to a man and his heirs, as formerly they often were, they are real, because personal property can not be made to descend to heirs.

Franchises. **521.** A franchise or liberty is a special right, different from the rights of persons generally, granted to an individual by the government. It has been defined as "a royal privilege, or

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[8] See § 93.

branch of the King's prerogative, subsisting in the hands of a subject,"[9] or in the United States as "the power of the government in the hands of an individual." A franchise may include some or all of the following elements: (1) Powers or capacities; so that it is legally possible for the persons having the franchise to do what for persons in general is legally impossible, *e.g.* to be a corporation or to hold a private court. (2) Special privileges; so that the holders of the franchise are permitted to do acts which, though in themselves possible for any one to do, are forbidden to persons generally, *e.g.* to build a railroad in a highway or to maintain a public ferry. (3) Monopolies; as where a water company is granted an exclusive right to supply a town with water. (4) Property rights of various kinds; thus a railroad company which has been given the right to construct its road in a street has a special easement in the street itself. But property rights which are a part of the franchise must be distinguished from property rights which the holder of the franchise acquires in the exercise of or for the purpose of exercising his franchise; thus if a ferry company owns boats, the ownership of the boats is not a part of its corporate franchise or of its ferry franchise. Franchises may be real or personal property. They are real, if granted to a man and his heirs, or generally if they involve easements in hold for life or in perpetuity.

Powers.

Special privileges.

Monopolies.

Property rights.

522. Certain particular franchises call for notice. Many of the rights of lords of manors, for instance the right to hold private courts, are franchises.

Particular franchises.

Under the Norman kings the right of hunting and killing game was taken away from persons generally and reserved to the King and his grantees. The rights of park, chase and free warren are franchises relating to the keeping and killing of game. These franchises are now of little importance in England, the right to kill game being regulated by the game laws. In the United States there are no such franchises. Easements to hunt or shoot upon another's land may be acquired by private grant, and are not franchises.

Killing game.

There are also sundry franchises relating to fishing. As will

Fisheries.

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[9] 2 Black. Com. 37.

be hereafter explained, the public generally have a right to fish in navigable waters, and a man may have a common of piscary in the land of another. But those rights are not franchises, that is, they are not rights pertaining regularly to the state and only in special cases by act of the state vested in individuals. The name free fishery is sometimes applied to the general right of the public and sometimes to an exclusive right to fish in public waters granted by the state to an individual, which latter is a franchise. Such an exclusive right is also sometimes called a several fishery; and again the latter name is applied to an exclusive right to fish on land which pertains to the owner himself or is derived from him, whereas a common of piscary is not an exclusive right. But the names of the various kinds of fisheries are used in the books in a very confused and indefinite manner.

Toll bridges and toll gates.

Ferries.

The right to maintain a toll bridge or toll gate on a river or highway is a franchise; and so is the right to keep a public ferry and carry persons and goods over for pay, which the law does not permit any one to do unless he has a franchise.

The elective franchise.

The right to vote is a franchise; and it has been held that a voter may have an action against the election officers, if they wrongfully reject his vote or remove his name from the list of voters.

Right to attend a public school.

The right to attend a public school is a right of this nature. There seems to be some doubt whether the right belong to the scholar or to his father.

Rent.

523. Rent (*reditus*) is a compensation paid for the use of land. It is defined as "a certain profit issuing yearly out of lands and tenements corporeal."[10] It is usually paid in money, but need not be; it may even consist in personal services. It must be fixed or certain in its amount, or capable of being reduced to certainty. By a yearly profit seems to be meant no more than that the rent must be payable at fixed times or intervals, annual payments having formerly been most common.

Rent must issue from land.

It must issue out of the land; by which is meant that the right to rent is a right *in rem* in the land, and the duty to pay it is

[10] 2 Black. Com. 41.

attached to the tenancy of the land, and does not exist simply by virtue of a contract between the parties. Any person who becomes tenant must pay the rent. A rent is usually created either by a provision, called a reservation, inserted in the grant or lease when land is conveyed, as where a landlord lets land to a tenant on rent, or by a direct grant of the rent by the tenant. A reservation or grant of rent, though an agreement, is not strictly a contract. There may be, and often is, also a contract to pay the rent; but the right created by such a contract is an ordinary contract right, a right *in personam*, not an incorporeal hereditament. In such a case the party entitled to the rent has two distinct rights to it, the contract right and the right created by the reservation or grant. Rent can only issue out of corporeal hereditaments; therefore if money or any compensation is paid for the use of chattels or for being permitted to exercise any incorporeal hereditament or abnormal property right, this is not technically rent, though similar to it and often so called.

How a rent is created.

Must issue out of corporeal hereditaments.

524. There are three kinds of rent, rent service, rent charge and rent seck. Rent service was originally where a feudal relation existed between the parties, that is, it was rent payable by a feudal tenant to his lord as his feudal service. It was also accompanied by corporeal services, at least an oath of fealty. However, the relation of a tenant for years or at will to his landlord having some resemblance to the feudal relation, rent payable on the hiring of land was included in this class. At present therefore rent service may be said to be rent which is incident to a reversion or at least to a possibility of a reverter; where, that is, the person to whom the rent is payable has some estate or interest in expectancy in the land beside the rent, to which interest the rent is appurtenant. The rent may, however, be granted by the reversioner to another person, and thus be separated from the reversion and exist as a right in gross. A landlord has a right to bring an action for the rent if it is not paid. But in addition to this he has the peculiar remedy of distress or distraint, which is a right, in case default is made in payment, to enter upon the land and seize any chattels which he can find there, whether they belong to the tenant or not, and to hold the chattels so seized as security for the rent, with a right

Rent service.

Rent in gross.

Distress.

similar to the right of a pledgee to sell them on notice if the rent is not paid. But certain kinds of chattels are by law exempted from distress, which are generally the same as those that are exempted from seizure on execution,[11] and comprise such things as necessary food and clothing, the tools of the tenant's trade and a few others of the prime necessaries of life. In most of the United States the right to distrain for rent does not now exist, and in England it has been much restricted by statute. Any payment, whether rent or not, for which the creditor has a right to distrain is said at common law to be charged upon the land.[12]

Payments charged upon land.

Rent charge and rent seck.

In rent charge and rent seck the owner of the rent has no other interest in the land, and there is no feudal relation between him and the tenant who pays the rent; as if A, being tenant in fee simple, grants to B, a stranger, a rent to issue out of his land, or conveys his whole estate to B, not retaining any reversion, and reserves a rent to be paid to himself. There is no right to distrain except by express agreement. If in the instrument which creates the rent it is expressly charged upon the land, that is, if a right of distress is stipulated for, the rent is a rent charge; if not, it is a rent seck, *reditus siccus*.

Quit-rents.

Special names are also given to particular kinds of rent, without reference to the foregoing classification. Rents of assize or quit-rents (*quieti reditus*) are certain ancient rents paid by tenants in manors to their lords, whose amount is established and can not be varied; if payable by freehold tenants they are called chief-rents.

Fee farm rents.

A fee-farm rent is a rent issuing out of an estate in fee and amounting to at least one fourth of the rental value of the land at the time of its reservation.

Rack rent.

Rack rent is a rent amounting to nearly or quite the full rental value of the land, *i.e.* a competition or market rent, such as a landlord could get by offering his land to the highest bidder, in contrast to the customary or feudal rents which are common in England and are often relatively small.

Payment of rent.

525. Rent is regularly payable on the land and before sunset of the day on which it falls due. A rent service is real

[11] See § 1073.

[12] In equity a charge upon land has a different meaning; it denotes an equitable lien.

or personal property according to the nature of the reversion to which it is incident; and a rent charge or rent seck is real, if it issues out of a heritable or life estate and is granted for life or to a man and his heirs. Real or personal.

526. An annuity is a right to receive a fixed sum of money each year from another person. It is usually personal property, but is sometimes granted to a man and his heirs, and is then real property. Generally it is not charged upon land, but it may be. An annuity charged upon land is practically the same thing as a rent charge. Insurance companies often make it a part of their business to grant annuities. For a fixed price paid at once the company agrees to pay to the grantee an annuity so long as he lives, the price being calculated according to the probable duration of the life of the grantee. The English government formerly sold annuities in the same manner, but discontinued the practice early in the nineteenth century. A pension is a kind of annuity Annuities. Pensions.

A corody is a right to receive at stated times, generally from ecclesiastical persons or corporations, allotments of provisions. In lieu of them a pension in money is sometimes paid. Like an annuity it is usually personal property, but may be made descendible to heirs. Corodies are unknown in the United States. Corodies.

CHAPTER XXXII.

RIGHTS IN WATER.

Navigable water.

527. Water is either navigable or non-navigable. Navigable water by the common law rule is water where the tide ebbs and flows, that is, the sea and waters reached by the ocean tides. In

American rule.

the United States, where there are large non-tidal lakes and rivers, the common law rule has generally been abandoned as unsuitable, though a few states retain it; and any lake or river is regarded as navigable where large vessels can go.

Not the subject of property.

Navigable water or the land under it is not generally the subject of private property, though the state sometimes grants to private persons exclusive franchises or rights of use in it, for instance an exclusive right to plant oysters or to fish in a particular place.

Ownership to high water mark.

A person who owns land abutting upon navigable water owns only to high water mark; the shore below that belongs

Rights of abutting owners.

to the state. But the abutting owner has an easement in the shore, appurtenant to his land, of access to the water, so that no one else may place any thing on the shore and shut him off. He also has the exclusive right to wharf out to deep water and to possess and use the wharf, so he does not thereby obstruct navigation.

Public right of use.

The public generally, and every person equally, has a right in the nature of an easement to use the water or the shore below high water mark for any lawful purpose, such as naviga-

Navigation and fishing

tion, fishing or taking sand or seaweed. The right of navigation is superior to the right to fish, so that a vessel in its course over a fishing ground may frighten away the fish and so disturb the fishing, or may even, if necessary, run over nets, but must not

Navigable waters are highways.

do so wantonly or maliciously All navigable waters are public highways. Also in waters which are not technically navigable but yet are capable of being used for transporting merchandise by boats or for floating logs or the like, the public have a right of use for such purposes; these are said to be highways. But this does

not include any right to use the banks for towing or for loading or landing goods. In some of the United States there are also certain streams, lakes or "great ponds" which, though not navigable, are regarded as open to such public uses as fishing, bathing, or cutting ice. Other public uses.

528. Of rights in non-navigable waters the most important are in natural watercourses. A watercourse is a brook or river, *i.e.* a stream of water flowing habitually in a defined channel with defined banks, as distinguished from mere surface water which collects upon land or runs down swales or depressions in times of rain or the melting of snow. Land adjoining a watercourse is called riparian land, and the proprietor of such land a riparian proprietor. Water courses. Riparian land and riparian proprietors.

The land under a watercourse is usually private property, and the *prima facie* presumption is that a riparian proprietor owns to the middle of the main channel, *ad filum ripae*. But in case of large rivers or lakes, which are not technically navigable, it is held in some places that private ownership extends to low water mark only. Land under a water course.

The water, however, is not owned by any one; but each riparian proprietor has, as appurtenant to his land, certain rights in it in the nature of easements. He has a right to have it come down to his land in its natural flow and unpolluted, and to have it pass off from his land in its natural flow. *Aqua currit, et currere debet ut solebat.* It is a violation of a riparian proprietor's rights for a proprietor farther up the stream, or for any person, to divert or obstruct the stream so as to prevent it from coming to his land, to change its channel so as to cause it to enter his land at a different place from where it naturally enters, to draw off water so as to substantially diminish its flow, or to throw any thing into it so as to foul or clogg it. It is also a violation of his rights to place obstructions in the stream below his land, and thus set back the water upon his land or prevent it from flowing off freely. But the right to the flow of the water is subject to certain rights of reasonable use of it by other riparian proprietors. Rights in the water. To its flow.

529. The uses which it is possible to make of the water are of three kinds, namely: (1) natural uses upon the riparian land, (2) artificial uses upon that land, (3) uses upon other land. Riparian proprietor's rights of use.

Natural uses. Natural uses are *ad lavandum et potandum*, *i.e.* for drinking, watering cattle, washing and ordinary domestic uses. All others, *e.g.* for running mills and factories, irrigation or cutting ice, are artificial. For natural uses a riparian proprietor may probably take as much of the water as he needs, even to entirely exhausting the stream, though doubts have been expressed whether the right goes quite so far as that.

Artificial uses. For artificial uses the English rule seems to be that it is unreasonable and unlawful to take so much of the water as to cause any sensible diminution of the flow. But in the United States the rule is somewhat less strict; a riparian proprietor may make a reasonable use of the stream, even though that use somewhat diminishes the quantity of water that passes down, so it does not work "actual material and substantial damage to the common right," the right of each proprietor being "limited and qualified by the precisely equal right of every other proprietor." For many purposes, *e.g.* for running a mill, it is necessary to pond the water. This may be done in a reasonable manner, even though it to some extent interferes with the natural flow.

Ponding the water.

Uses off of the riparian land. Taking water for use off of the riparian land, *e.g.* to supply an artificial canal or to irrigate land at a distance from the stream, seems to be wrongful if any substantial, or perhaps any sensible, diminution of the flow is thereby caused.

Drainage into streams. As to draining into a stream or throwing refuse into it, thus fouling the water or obstructing its flow, some distinctions must be observed. A riparian proprietor has an absolute right to permit the natural drainage of his land to flow into the stream, or even to pump up water which naturally collects in mines on his land and discharge it into the stream, even though such drainage water contains noxious substances which spoil the stream for the use of lower proprietors. But he has no right to bring additional water upon his land artificially and turn that into the stream to the injury of lower proprietors.

Pollution of streams. Pollution of a stream in other ways is not necessarily wrongful, if it be reasonable in nature and extent. It is often necessary

to drain into streams. When a certain kind and amount of pollution is necessary, not merely convenient, in connection with the use of the water itself, and not merely with the use of the riparian land as land, or is incidental to a natural use of the land, it may be held reasonable when it otherwise would not be. Thus suffering sawdust from a sawmill to fall into a stream may be allowable, if it is impossible without doing so to use the water for milling at all, when it would not be if the mill could, though at the cost of some inconvenience, have been constructed so as to avoid this; and there may be a difference between the fouling of a brook by cows which are pastured upon the land standing in it, and by the running of a drain into it from a cow stable.

Lakes.

530. Rights in natural ponds and lakes are similar to those in watercourses. In artificial watercourses the rights usually depend upon agreement; but a person who makes a canal or pond on his own land would in most cases own the water, while it remained on the land, as well as the land under it.

Artificial watercourses.

Underground water.

531. Subterranean water flowing in a known and defined channel is a watercourse, and is subject to the same rules as if it ran on the surface. But water standing in the soil or percolating through it not in such a channel belongs to the owner of the soil, and he may divert it, foul it or appropriate it to his own use at his pleasure. Thus a person may excavate on his own land, though he thereby cuts off the supply of water from his neighbour's well; and it has been held that he may turn sewage into a hole on his own land, although it soaks into the soil, fouls the water percolating through the soil, and thus pollutes a well on another's land to which the percolating water finally comes. But the contrary has also been held.

Percolating water.

Surface water.

532. Surface water, such as rain water, standing or flowing upon land belongs to the owner of the land, who may use as he pleases. Nor is he bound to do anything to prevent it from flowing from his land on to other land, no matter how much damage it may do there. He may cultivate, grade, build upon or otherwise change the surface of his land, and thereby change the flow of the surface water even to the injury of lower land; but he may not collect the surface water into a body and

discharge it in a concentrated stream upon the lower land, or bring additional water upon his own land by artificial means, *e.g.* for irrigation, and turn that upon his neighbor's land. So if two mines lie side by side with an opening from one into the other, it is not wrongful if the water which naturally collects in the upper mine flows down into the lower one. But it is wrongful for the owner of the upper mine to introduce additional water, for instance by pumping from another mine of his, and let that run down.

Drainage of mines.

Servitude to receive surface water; civil law rule.

By the civil law the owner of upper land has a natural easement in lower land to have it receive his surface water, so that the lower proprietor may not erect any barrier to prevent the surface water from coming down. This rule prevails in some of the United States. But the common law creates no such easement, but treats surface water as a common enemy which any one may exclude from his land if he can. A man may therefore build an embankment to prevent surface water from coming on to his land, even though he thereby causes it to collect upon neighboring land to the latter's damage.

Common law rule.

CHAPTER XXXIII.

RIGHTS IN HIGHWAYS.

Meaning of highway.

533. A highway means a public street or road *i.e.* one that has been dedicated to public use. The soil of a highway may be owned by the public, *i.e.* by the government or a city, township or county, or by private persons. Presumptively the owner of land abutting on a highway owns to the middle of the street. The owner of the soil of a highway has the same rights in it as owners in general have in their land, subject to the easements presently to be described. He is considered to have possession of it. He may make any use of it that he pleases, as of his other land, that does not interfere with its use as a highway, *e.g.* may cut grass growing there, or pasture cattle upon it unless forbidden by some statute or local ordinance. He may sue a third person for any unwarranted use of or intrusion upon or for an injury to it, for instance for cutting down a tree growing in it.

Ownership of the soil.

Right to construct and repair.

534. But the public, and also private individuals, have rights in the highway in the nature of easements. The public officers designated by law for that purpose have a right to construct, alter and repair the road. They have a large discretion as to what kind of a road they will make; and in making it they may generally raise or lower the grade, plant or remove trees, and make such alterations in the surface as they think best. After the road has once been laid out and constructed, the prevailing doctrine is that the proper authorities may change its grade or otherwise alter it in a reasonable manner and extent without any compensation being due to abutting owners whose property is thereby damnified; but they can not without making compensation entirely close the street or make such changes as wholly unfit it for ordinary highway uses. In some of the United States provision is made by statute for compensation to persons whose land is damaged or depreciated in value by any change in the street.

Alterations in highways.

Public rights of use.

535. Every person has a right to use the street for ordinary highway purposes, in a reasonable manner and with due regard

to the equal rights of others. In the United States by custom or statute persons meeting on the highway should turn to the right, in England to the left; but this does not apply to a person passing another from behind. If the highway is impassable, it is permitted to pass over adjacent land in a reasonable and proper manner. The right of using a highway is not confined to ordinary passage, nor to those uses that do not obstruct it more than ordinarily. It is proper to move a building through the street in a reasonable manner, and children have a right to play there. A person may also load and unload goods in the street, or temporarily deposit there building materials. But pasturing cattle, exhibiting shows, holding public meetings, the permanent storage of goods or keeping stands for the sale of goods are not lawful highway uses. The local authorities generally have power to make reasonable ordinances or by-laws for regulating the exercise of these rights of use. Connected with and for the purpose of making available his right of use, each member of the community has a right in the condition of the highway.

Ordinary highway uses.

The condition of the highway.

536. Any person who has land abutting on the highway, whether he owns the soil of the highway or not, has a special easement in it, different from that of the public in general, to have it kept open and unobstructed for the access of light and air to his premises and also for the safe and convenient access and egress of persons and goods, to a reasonable extent and in a reasonable manner, and may have an action for any obstruction of or interference with the highway that prevents such access or egress.

Easements of abutting owners.

537. The above mentioned uses of and easements in the highway are of common right, and no special authority from the legislature is needed for their exercise or enjoyment. But any use of the highway for other than highway purposes, for instance erecting a building in it or turning a street into a road-bed for a railroad to the exclusion of ordinary traffic, is a violation of the property right of the owner of the soil, of the public rights in its condition and of the special easements of abutting owners, and if done by public authority constitutes a taking of private property for public use. If such a use is to be permitted, therefore, the party injured thereby must be com-

Common right.

Uses other than highway uses.

pensated.[1] But there is a class of uses which, though not lawful for individuals without special authority, because they interfere with the ordinary use, yet are so far highway uses that they may be authorized by the legislature, or sometimes by the local authorities, without making compensation, it being assumed that when the highway was originally laid out compensation was made to the owner of the land for all damages that he would suffer from its use for all highway purposes. There is a difference in this respect between country roads and city streets. In the former the public rights are probably confined to the use of the surface, and gas or water pipes or sewers laid under the road or telegraph poles placed in it constitute an additional burden upon the fee and are not included among highway uses, at least in the United States; but in city streets such uses are proper with the consent of the competent public authorities. As to whether a railroad on the surface of a street, which does not prevent its still being used for ordinary highway purposes, is a highway use which may be authorized without additional compensation to the owners of the soil or to abutting owners, an ordinary commercial road is not a proper highway use, but a street railroad for the carriage of passengers is. But an elevated railroad supported on pillars at a considerable distance above the surface, which darkens the lower stories of abutting houses, is a violation of the easements of the owners of the buildings, which must be compensated for.

Extraordinary highway uses.

Railroads in streets.

[1] See § 735.

CHAPTER XXXIV.

PROPERTY IN CHATTELS.

Property in chattels.

538. Personal property includes rights in chattels. These never came under feudal rules; there are no tenures, no estates,[1] and no seizin. Nor does the doctrine of ouster apply to property in chattels. If a person wrongfully gets possession of a chattel, he does not thereby acquire any right in it, not even a defeasible right; he gets merely the possession and the owner's rights remain unimpaired.[2] The owner is however sometimes said to be ousted from the possession.

No ouster of chattels.

Property rights in chattels are of six kinds, as follows.

Ownership.

1. Full ownership, of which enough has already been said.

Qualified property.

539. 2. Qualified property. This is a right which while it lasts has all the attributes of full ownership, at least as regards civil rights though in the criminal law it is, or was, sometimes differently treated, but which differs from ordinary ownership in being acquired or lost in special ways. The subjects of this right are certain animals. Some species of animals are regarded as tame, *domitae naturae*, and others as wild, *ferae naturae*. The former include all kinds of animals which are usually in fact tame and are usually kept for use and profit, such as horses, cattle and poultry; the latter all wild species, and also those actually tame ones which are ordinarily kept merely for pleasure, such as cats, dogs and singing birds. Tame animals are the subjects of ordinary ownership. Animals *ferae naturae* generally belong to no one, but any one is at liberty to capture or kill them. But a qualified property may exist in them in three cases or three ways: (1) *Per industriam hominis*, where they are actually tamed or confined, as is true of dogs and cats, deer in a

Wild and tame animals.

Property in wild animals.

Animals tamed or confined.

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[1] The expression personal estate is sometimes used for personal property, but incorrectly.

[2] So is the weight of modern authority, though there are some decisions to the contrary, and perhaps the rule of the old common law was different.

park or fish placed or bred in a private pond. But if the animal escapes and wanders away, the owner's right ceases, except so long as he continues in fresh pursuit, and any one who finds the creature may take it, whereas a horse or a cow that strays from home does not cease to belong to its owner. But if the animal is actually tame and permitted to go at large, it continues to belong to the owner so long as it has *animus revertendi*, which is the case ordinarily with dogs and cats, or with bees which leave the hive in search of honey but return. (2) *Propter impotentiam;* if wild creatures breed upon a man's land, the young are his property till they are able to go away. (3) *Propter privilegium*, which is where, in England, a person has a special authority to kill those kinds of wild animals known as game within certain limits, in which case he has a qualified property in the game for the time being in those limits.

The young of animals.

Game.

540. 3. Special property is any inferior property right in a chattel which includes a right of possession that is not precarious. Thus a person who hires a chattel for a fixed time, within which time the owner can not take it back, or a person to whom a chattel has been pledged to secure a debt which is still unpaid, has a special property in the chattel; but an ordinary borrower, who may at any time be called upon to restore the chattel, or the finder of a lost article who takes possession of it to keep it for the owner has not, his possession being merely precarious.

Special property.

4. A right of precarious possession, either of bare possession or coupled with a right of use, may exist in a chattel, and is a species of inferior property right. A bailee by deposit or commodatum has only a right of this kind. A right of possession may mean a mere permissive right, where the party's possession is rightful in the sense that the law permits him to take or keep possession if he chooses, so that his possession is not wrongful, as is the case with the finder of a lost article; or it may be a protected right, such as the owner or a bailee of a thing has.

Precarious possession.

541. 5. Rights resembling easements, *i.e.* rights of use without the right of possession, may be had in chattels, but are not common, because it is seldom practically possible to use a chattel without having possession of it. There is no special name for these rights, but sometimes they are called easements.

Easements.

Limited property rights.

6. Limited property rights may be had in a few things which are not susceptible of full ownership.[3]

Several joint and common ownership.

Rights of co-owners.

542. Personal property may be owned in severalty, in common or jointly, as real property may. Each co-owner has at law a right to the possession and use of the chattel; and apparently if one keeps the exclusive possession and excludes the others, he is merely exercising his lawful rights and the other co-owners have no remedy but to watch for a chance and take exclusive possession in their turn. But one owner in possession has no right to injure or destroy the chattel; and perhaps if he was using it in a way that threatened its injury or destruction a court of equity might compel him to give security to the other owners against this or to surrender the possession to them, at least if it appeared that he was pecuniarily irresponsible so that damages could not be recovered against him. And where the property is divisible, as in the case of a quantity of grain or money, the rule in the United States seems to be that each co-owner is entitled to take his share in severalty, and an exclusive possession of the whole by one against the will of the others is wrongful. Any co-owner may sell his share, and may deliver possession of the chattel to the buyer. But if one attempts to sell the whole, as if he were sole owner, and delivers it, he exceeds his right. The others may retain their rights, remaining owners in common with the buyer, and treat the seller as guilty of the wrong known as conversion,[4] or they may ratify the sale and claim their shares of the price. For the rest, the rules are substantially the same as in case of co-ownership of land.

Partition.

Sale by one co-owner.

Rights in expectancy in chattels.

543. As to rights in expectancy in chattels; whenever the the right of present possession is separated from the ownership, the owner's right must be a right in expectancy similar to a reversion; and it is sometimes so called. This is the condition of the bailor in every bailment of chattels. But by the common law there could be no remainder in a chattel; a remainder attempted to be created was void, and the first donee took the whole property. Equity, however, permitted remainders in chattels. Thus if the furniture in a house were left by will to a widow

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[3] See § 439. [4] See § 880.

for her life and after her death to her children, at common law the gift to the children would have been void and the widow would have become the absolute owner; but equity would have treated her as trustee for the children, recognizing them as having an equitable right to the furniture after her death. And at present remainders may be created in chattels at law. By the modern law when a remainder has been created in personal property a court of equity may, if there is reason to apprehend that the person having the particular right in possession will waste or wrongfully dispose of the chattels, compel him to give security to keep them properly for the remainderman.

CHAPTER XXXV.

LIENS.

Liens.

544. A lien is a right in property given to secure the performance of some act, usually the payment of a debt. Liens may exist in either real or personal property. They are of three kinds, namely: (1) rights on conditions subsequent or conditiona limitations, (2) possessory liens, and (3) hypothecations.[1]

545. Liens of the first kind are as follows.

Statute merchant and statute staple.

By the statute of 13 Edward I, *de mercatoribus*, an obligation resembling a recognizance, for the security of a trade debt, could be entered into before the chief magistrate of a trading town, and by a statute of 27 Edward III before the mayor of the staple or "grand mart for the principal commodities of the kingdom, formerly held by act of parliament in certain trading towns, under which, if the debt was not duly paid, the debtor could be imprisoned, his goods seized and sold, and also his lands delivered to the creditor till the rents and profits satisfied the debt." A creditor holding land in this way was called a tenant by statute merchant or statute staple. By statutes of 23 Henry VIII and 8 George I similar obligations, taken before either of the chief justices, or their substitutes if the court be not in session, or before the mayor of the staple at Westminster or the recorder of London, may be entered into by persons not traders.

Elegit.

When a person has got judgment for a debt at law, he may have from the court, by virtue of a provision in the statute of Westminster 2nd, a writ, called a writ of *elegit*, under which the sheriff gives him possession of one half of the debtor's lands to be held by him until the judgment is paid, during which time he is called tenant by *elegit*.

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[1] The names of the different kinds of liens are commonly used very confusedly without properly discriminating between them. A pledge for instance is often called a hypothecation. The latter name comes from the civil law, and is not yet in common use as a legal term the simple name lien is generally used instead of it

Estates under these statutes.

The rights of tenants by statute merchant, statute staple or *elegit* are peculiar kinds of estates different from any estates known to the common law. They are not held on tenure, and are personal property. The two next to be described, on the other hand, are ordinary common law estates or property rights but subject to a peculiar kind of condition subsequent, and may be either real or personal property.

Vivum vadium.

546. *Vivum vadium*, or living pledge, is where an estate of any kind is given to a creditor on a condition subsequent that the estate shall determine as soon as the rents and profits have satisfied the debt. This is called a living pledge because the land itself pays the debt. It is now rarely, if ever, used.

Mortgage at law.

547. In a mortgage, *mortuum vadium* or dead pledge, an estate or property right of some kind is conveyed to a creditor on a condition that the conveyance shall become void and the property shall return to the former owner if the debt is duly paid. This is a condition subsequent, but differs from most conditions subsequent in that it is not to be performed by the tenant himself but by the debtor, and also in that the estate is determined not by the breach but by the performance of the condition. The creditor to whom the estate is conveyed is called the mortgagee, and the person who conveys it to him is the mortgagor. The mortgagor is usually the debtor himself, but need not be, because one man may mortgage his property to secure another's debt. The estate or right conveyed is usually an estate in fee simple in land or the ownership of a chattel, but sometimes, especially in England, a long term, for instance of a thousand years. The mortgagee becomes tenant or owner of the mortgaged property, and like any other tenant or owner has the right of possession, unless the mortgage deed reserves this to the mortgagor; but the mortgagor is usually permitted to remain in possession, in which case he is tenant or bailee strictly at will to the mortgagee. The day when the debt is due is called the law day, and the mortgagee can not be compelled to receive payment of the debt before that day. If the debt is paid on the law day, the condition is performed, the mortgagee's right comes to an end, and the mortgagor may re-enter or take back his property; but if for any reason, even by mere accident, the payment is not made on that day, the condition is

Parties to a mortgage.

The mortgagee's rights.

Possession of the mortgaged property.

The law day.

Forfeiture.

broken, the mortgagee's estate or ownership becomes absolute, and the mortgagor can never have back the property, even though it be worth much more than the amount of the debt. In that case the debt is considered as paid, so far as the value of the property goes. This is a mortgage at common law.

Mortgage in equity.

548. Equity, however, takes a different view of a mortgage. In equity the mortgagor is regarded as the owner and the mortgagee as having a mere lien in the nature of a hypothecation upon the property. If the mortgagee takes possession, he is considered to hold for the benefit of the mortgagor and must account to the latter for the rents and profits of the property. Equity also will relieve against the breach of the condition, as against other conditions and forfeitures,[2] and will permit the mortgagor to redeem his property after the law day by paying the debt with interest and the costs of the proceedings to redeem. This equitable right of the mortgagor to redeem is called an equity of redemption. If the debt is paid on the law day, the mortgagee's right comes to an end by force of the condition contained in the mortgage, and no reconveyance from him to the mortgagor is necessary. But if the mortgagor redeems afterwards, that does not affect the mortgagee's legal title which has become absolute, and a reconveyance from the mortgagee to the mortgagor is necessary, which a court of equity will compel the mortgagee to make. But this right to redeem after the law day does not last forever. The mortgagee on his part may have an action in a court of equity against the mortgagor to foreclose the mortgage, in which action the court will appoint a time within which the mortgagor must redeem; and if he fails to do so within the time limited, his equity of redemption is foreclosed or cut off and the parties are remitted to their legal rights, *i.e* the mortgagee remains the absolute owner. This is called a strict foreclosure; its effect is not to transfer any right to the mortgagee or to create any new right in him, but simply to destroy the mortgagor's equitable right to redeem.

Possession of the mortgaged property.

Relief against the forfeiture.

Equity of redemption.

Effect of payment.

Foreclosure.

Strict foreclosure.

American rule as to mortgages of land.

549. In most, but not in all, of the United States a mortgage of land now has the same effect at law as in equity. The mortgagee does not become the owner, nor does he get in

[2] See § 262.

most cases the right of possession. He gets a mere lien on the land. A strict foreclosure is not permitted, and indeed is not possible, because even if the mortgagor's equitable rights were cut off the mortgagee would not be left in the situation of owner; but on a suit for foreclosure the land is sold by the order of the court, the debt and the costs of the foreclosure paid out of the proceeds and the remainder paid over to the mortgagor. But this doctrine does not apply to mortgages of chattels.

Foreclosure by sale.

550. Successive mortgages may be made of the same property Where the common law rule prevails only the first mortgagee gets a legal right, the rights of subsequent mortgagees being purely equitable, *i.e.* they are mortgagees of the equity of redemption only. But under the American rule all the mortgagees get rights of the same kind.[3] The mortgagor may redeem from any mortgagee, and any mortgagee from those who precede him; and any mortgagee may foreclose against the mortgagor and against those mortgagees who follow him. The rule is: redeem up; foreclose down. Any person who has any right or interest in the mortgaged property subject to the mortgage, *e.g.* a person who has hired land or acquired an easement in it after it has been mortgaged, may redeem and may be foreclosed.

Successive mortgages.

Redemption and foreclosure.

551. A possessory lien is where the creditor has the possession of a chattel with a right to hold the possession until the debt is paid. Such a lien can not exist in land. The lien-holder has no property right in the chattel beyond a bare right to keep possession, and in some cases a right to sell it He may not use it in any way, except so far as use is necessary for its preservation; *e.g.* a cow must be milked and a horse have a certain amount of exercise. It is necessary for the existence of this kind of lien that the lien-holder have possession in fact as well as the right of possession of the chattel, or that some person holds the possession for him, *e.g.* he may store the chattel in a third person's warehouse. But if he

Possessory liens.

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[3] Some courts have said that under the American rule the mortgagee's rights are purely equitable, that he has no legal rights at all. *Sed quaere;* he undoubtedly has a right *in rem.*

voluntarily surrenders the possession to the owner, he loses his lien.

Pledge or pawn.

The most important species of possessory lien is pawn or pledge, which is created by a bailment of a chattel for the very purpose of creating the lien.[4] In this case the pawnee or pledgee has not only a right to keep possession of the chattel until he is paid, but if default is made in payment he may sell it at auction, after reasonable notice to the owner, without any application to the court, and pay himself out of the proceeds, returning the surplus to the owner. Sales by pledgees, and in particular by pawnbrokers, are now in most places regulated by statutes. At present also, instead of selling the chattel himself, the pledgee may, if he chooses, apply to a court of equity and have a judicial sale made.

Sale of the chattel pledged.

Common law liens.

What are called common law possessory liens arise not from an actual agreement for a lien but by operation of law, or by an agreement implied in law, in many cases. Generally if a chattel is delivered to a workman for him to do work upon it, *e.g.* if cloth is given to a tailor to be made into a coat or a carriage is sent to a wright to be repaired, he has a common law lien upon it for his pay, and may refuse to restore it till he is paid. The lien holder, however, has not, like a pledgee, a right at law to sell the chattel in case of default in payment; but if necessary a court of equity will order a judicial sale. A lien of this sort is either general or special. The former is where the lien holder has a right to keep the chattel as security for all debts and claims which he has against the owner, while the latter is to secure some specific claim or claims.

General and special liens.

Hypothecation.

552. In a hypothecation the creditor has neither the ownership nor any estate or special property in the thing, nor the right of possession. He has merely a facultative right, a right if the debt is not paid to apply to the court and have a judicial sale of the thing made and his debt paid out of the proceeds. In the mean time the owner remains in possession.

No common law hypothecations.

Equitable liens.

This sort of lien was unknown to the old common law, and even at present the majority of such liens exist only in equity. Equitable liens, however, like equitable rights generally, are rights

[4] See § 381.

in personam merely, and do not belong in the class of normal property rights. They will therefore be discussed in another place. A mortgage in equity is a mere hypothecation, and so it is even at law under the American rule. The same true of mortgages in the civil law.

Judgment liens.

553. Judgment liens are a kind of legal hypothecations. A judgment for a sum of money rendered in a court of law creates in most places, though in some of the United States it does not have this effect, a lien on all the land of the judgment debtor which he has at the time when the judgment is docketed or registered, that is, duly entered in a docket or book kept for that purpose, and on all which he afterwards acquires. In the United States the lien only covers land in the county or, if the judgment is in a federal court, in the district, where the judgment is docketed; but provision is made for docketing transcripts of the judgment, which are brief memoranda containing the essential points of the judgment, in other counties or districts, and thus creating a lien there. The lien, being a right *in rem*, binds the land, after it has once attached, even in the hands of *bona fide* purchasers for value from the judgment debtor. But it can be discharged by a satisfaction piece, or written acknowledgement by the judgment creditor that the judgment is satisfied, which must be docketed in the same manner as the judgment. A judgment lien is enforced by a writ of execution issued by the court, under which the sheriff seizes and sells the land; but any rights which other persons may have acquired in the land previous to the docketing of the judgment are not affected by it. The buyer at the judicial sale takes as successor of the judgment debtor and acquires only his rights. Judgment liens exist only by statute; at common law a judgment did not create a lien.

Liens on land by attachment.

In certain actions the court will grant, pending the action, an attachment against the land of a party,[5] which, being duly recorded, creates a lien upon the land. If the party procuring the attachment fails in his suit, the attachment is dissolved; if he succeeds, he may have an execution against the land.

Liens on chattels by attachment and execution.

If an execution or warrant of attachment is levied upon chattels, the sheriff takes possession of them, and the lien which

[5] See § 1134.

he thus acquires is a possessory lien. But as soon as an execution is issued and placed in the sheriff's hands to levy, and before the sheriff takes possession, there is a lien on the debtor's chattels, which, however, does not avail against a *bona fide* purchaser of the chattels from the debtor for value. But if after the receipt of the execution by the sheriff the debtor makes a gift of the chattels or sells them to a person who has notice of the execution or warrant, the officer may take them from the donee or buyer.

Mechanics' liens.

554. By statute in most of the United States a person who furnishes labor or materials for the construction of a building may acquire, by filing a written claim in the proper public office, a lien in the nature of a hypothecation upon the building and the land upon which it stands for his pay. This is called a mechanic's lien, and is enforced by a sale of the property by order of a court if the claim is not paid. In some of the states such a lien is treated as equivalent to a mortgage and is enforced by a strict foreclosure. In this case, however, the effect of the foreclosure is different from that of the foreclosure of a true mortgage. Since the lien holder is not the owner of the property, even conditionally, before the foreclosure, the effect of the foreclosure decree is to transfer the land to him, not merely to cut off the owner's right to redeem.

Maritime liens.

555. Maritime liens are a very important kind of hypothecations, which exist only by virtue of the maritime law. They will be described in another place.[6]

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[6] See § 828 *et seq.*

CHAPTER XXXVI.

ABNORMAL PROPERTY.

Abnormal property.

556. Besides estates in incorporeal hereditaments, there are many other kinds of abnormal property rights which are rights *in rem*. Sometimes the subjects to which these rights relate are regarded as a kind of immaterial things; but usually no practical use is made of this conception, it is at most merely a convenient form of expression. The rights themselves are not incorporeal things. The most important of these rights are as follows. They are all personal property.

Inventions.

Patent rights.

557. In an invention the inventor has no common law rights. Any one who can find it out has a right to make use of it. But in order to secure to inventors the fruits of their labors, it is provided by statute that a right in the invention shall be granted to the inventor or his assignee on his application by letters patent from the government, so that the right is called a patent right, or more commonly simply a patent, though this latter word properly denotes the instrument by which the right is created. In order to be patentable the invention must be new and useful. The right, which is granted for a limited time, in England and in the United States for fourteen years, but which is sometimes extended by act of the legislature, is an exclusive right to make, sell and use the patented article. It is an infringement on the patent and a violation of the patentee's right for any other person without his license to make, sell or use the same article or one so much like it as to be substantially the same thing, though it may differ in unimportant details. A person applying for a patent must prepare specifications describing the invention, copies of which are annexed to the patent, and the exclusive right covers the invention only as described in the specifications. In the United States patent rights exist exclusively under national statutes. The states can not grant patents, nor can the state courts take cognizance of any suit for the infringement of a patent. A patent right has no effect outside of the nation

Infringement.

Specifications.

National law.

International patents.

which granted it. But it is now generally provided by treaties between civilized states that citizens or subjects of one may obtain patents in the other.

Literary and artistic property.

558. As to literary and artistic property; a distinction must be taken between the manuscript, book, picture, statue or other material object in which the author's ideas are embodied, which is a chattel and the subject of normal property rights, and the literary or artistic composition. In the latter the author or artist has at common law an exclusive right of first publication. So long as he chooses to keep it unpublished, no one else may publish it in any way or take copies of it without his consent. A play, which is useful for two purposes, both to read and to perform on the stage, is protected in both uses; no one may publish it in print or perform it on the stage unless by the author's permission. The right is not in the ideas, any one else may use and publish the same thoughts, but in the particular form, the combination of words or symbols, by which the ideas are expressed.

Common law rights of authors and artists.

Publication.

As soon as the author publishes his composition his common law rights in it cease, and any one else is at liberty to make use of it in any way. Publication means such a communication of it to the world as evinces an intention to dedicate it to public use. The communication of it to particular persons for particular purposes, such as the delivery of a lecture, the performance of a play, the photographing a picture and giving away a few photographs to friends or the transmission of news by a news agency to its own subscribers, is not a publication; and the persons to whom the communication is made may only use it for such purposes as were intended to be subserved by the communication. A student for instance may take notes of his professor's lectures and use them in his own studies, but may not print and publish them.

Copyright.

559. Copyright exists only by statute; in the United States, under national statutes. Under the copyright acts a larger right is conferred upon the author than exists at common law, namely an exclusive right for a term of years to reproduce or publish the work. An infringement of a copyright is commonly spoken of as piracy.[1] It is not necessary to constitute an infringement

Infringement; piracy.

[1] This, however, is not a proper technical meaning of the word piracy.

that the whole of the copyrighted matter, or even the greater part of it, be reproduced, nor that the piratical publication should supersede or be capable of being used as a substitute for the original work. But a fair use of a copyrighted book by reasonable quotations from it, for instance in a review of it or in the work of an opponent who cites it for the purposes of criticism, or by another person writing on the same subject and quoting it in support of his views, is not wrongful. Also mere resemblance is not piracy, unless there is copying. Maps of the same place and translations from the same foreign work must necessarily resemble each other; and two directories of the same city ought to contain the same names in the same order. The rule here is that each author must resort to the original sources of information for himself and not simply appropriate the labors of the other. Copyright covers only the form, not the ideas. Thus it has been held that the inventor of a new system of bookkeeping could not, by copyrighting the book in which he expounded it, get an exclusive right in the system so as to prevent another person from publishing the same system in a different book. He should have patented it. An abridgement of a book, in which the same ideas are set forth in the same order but in different and more concise form, is not an infringement on a copyright, but is an independent work requiring intellectual labor and judgment. But this must be distinguished from a mere compilation made up wholly or mainly of extracts from the original in its very words or substantially so. The translation of a book is not an infringement of the copyright, unless especially made so by statute or treaty. A copyright, like a patent, has no extraterritorial validity. But international copyright is now largely secured by treaties and statutes.

Quotations.

Mere resemblance.

No property in ideas.

Abridgments.

International copyright.

560. A trademark is a name or device used by a person upon his goods or in his business to distinguish his goods or business from those of others. Besides marks placed upon goods, trademarks include such things as the name of a hotel or of a magazine. In order that a person may aquire an exclusive right in a name or symbol as his trademark, it must be one arbitrarily selected by him for that purpose. Arbitrariness is an essential characteristic of a trade mark.

Trademarks.

Must be arbitrary.

Descriptive names.

If the name is merely descriptive of the goods or business, the party can not by his use of it prevent other persons having similar goods or businesses to which the same description would apply from using it to denote their goods or business. No one can have a monopoly in the ordinary use of the English language. Therefore such names as "Ferrophospated Elixer of Calisaya Bark," "International Banking Co." or "Health Preserving" on corsets have been decided not to be good trademarks. For the same reason a person can not use his own name or the name of a place where his goods are made or where he carries on his business as a trademark, so as to deprive another person having the same name or manufacturing similar goods or carrying on a similar business in the same place of the right to use it. The form, size or color of the packages in which goods are put up or the general appearance of the goods themselves can not be a trademark, though it may be a patentable invention. A trademark is meant for the protection of trade. Therefore it can not exist in gross, disconnected from any use of it in business or from any interest in the goods or business in which it is employed. Thus the use of a trademark by a person on one kind of goods does not prevent another person from using the same mark on entirely different goods. In a case where a trade union, the members of which worked for wages at the trade of cigar making, adopted a certain label intended to be placed upon cigars made by the members to distinguish them from cigars made by non-union workmen, the union itself not being engaged in the business of cigar making, it was held that the union had no right in the label as a trademark.

Names of persons and places.

General appearance of goods.

A trademark can not exist in gross.

Common law rights.

Registration.

National and state law.

Nature of the right.

Rights in trademarks exist at common law, though both in England and the United States various statutes have been made for their protection, particularly statutes providing for their registration in some public office. But a statute of Congress for the registration of trademarks, which imposed penalties for infringements upon them, was declared unconstitutional and void by the Supreme Court of the United States on the ground that the subject of trademarks belonged to the jurisdiction of the states not of the national government. The right is an exclusive right to use the mark upon or in connection with the kind of

goods or business to which it has been appropriated by the first user. To constitute a violation of the right it is not necessary that the counterfeit or simulating trademark be an exact copy of the original one. It is enough if the resemblance between the two be such that it is calculated to deceive ordinary purchasers or customers. Infringement.

561. The good will of a business may form the subject matter of a property right, and is often very valuable. The actually valuable element in a good will is the probability that customers of the old business will continue to deal with the person who has become the owner of it. But that probability can not of and by itself be the subject of a right. It can only exist as such in connection with certain rights of other kinds. A good-will therefore usually consists of a group of rights of variable composition. Among those rights are: (1) The exclusive right to represent oneself as the successor of the person formerly carrying on the business. This right is peculiar and essential to a good-will. (2) The right to use the old firm or business name. (3) The right to use the premises where the business has been carried on, which is a normal property right When business is carried on in premises leased for that purpose, the good will generally includes the lease. (4) Patents, copyrights, trademarks *etc.* formerly used in the business, which are abnormal property. (5) Trade secrets formerly used in the business, the rights in which will be presently considered. (6) The former proprietor often binds himself by contract not to carry on business in competition with the purchaser of the good will; but such contracts must not be such as the law deems to be against public policy as being in restraint of trade.[2] In the absence of such a contract the former proprietor is at liberty to compete. Good will. Right to stand as successor. The firm name. The business premises. Patents *etc.* Trade secrets. Contracts against competition.

562. A trade secret or other secret is somewhat similar to an invention, and there is no property right in it; though a person may in various ways come under an obligation to another not to make use of or reveal a secret of which he has knowledge. When a person has been employed by another in business and has thus become acquainted with his employer's trade Secrets.

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[2] See § 866.

secrets, courts of equity have often granted injunctions forbidding him to reveal or use them after quitting the employer's service.

Stock in a corporation.

563. Stock in corporations is a kind of immaterial thing in which property rights may be had. These rights resemble normal property rights so far as the nature of their subject admits. They are generally personal property, even though the corporation owns land; but in some corporations whose principal object is the owning and use of land the stock has been declared by their charters to be real property. A certificate of stock, *i.e.* the document itself as distinguished from the stock which it represents, is a chattel, and is the subject of normal property rights.

Certificates of stock.

Debts and claims.

564. Debts and other kinds of abnormal property which are rights *in personam* will be treated of in another place.

CHAPTER XXXVII.

TITLES TO PROPERTY.

565. The methods by which property rights may be acquired are divided by the law into two great classes, descent and purchase. The former is only applicable to freehold estates of inheritance, and is where on the death of a tenant in fee his estate passes to his heir. All other ways of acquiring property rights either real or personal fall under the general head of purchase, as synonymous with which the word conquest was sometimes used by the old lawyers; and any person who acquires property by any other method than descent is called a purchaser. Thus it will be seen that the word purchase has a much wider meaning in its technical than in its ordinary use, and is not confined to the case of buying for money. However, some authorities limit the word purchase to acquisition by transfer from some former holder.

Descent.

Purchase.

The law favors descent rather than purchase, so that if an heir takes an estate from his ancestor he shall, if possible, be considered to take it as heir and not as a purchaser. Therefore if a man leaves his estate to his heir by will, the heir will succeed as heir and not as a donee under the will, the will thus becoming of no effect. This principle is further exemplified in what is known as the rule in Shelly's Case, which is as follows: when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited mediately or immediately to his heirs in fee or in tail, the words "his heirs" are words of limitation of the estate, and not word of purchase. By words of limitation are meant words which are used merely to limit or describe the estate given; and words of purchase mean words that are used to convey an estate to a person. The effect of the rule therefore is that the words are considered to have been used not to give any estate to the

Descent is favored.

The rule in Shelly's Case.

Words of limitation and of purchase.

heirs but simply to describe what kind of an estate the ancestor is to take. Thus if a deed or will is made purporting to give land to A for his life with a remainder in fee to his heirs, A takes at once an estate in fee and the heirs take nothing; it is the same as if the gift had been simply to A and his heirs.[2] This is an artificial construction which probably in most cases defeats the actual intent of the gift; and in England and some of the United States the rule is now abolished.

The acquisition and loss of property.

566. When a property right is acquired or lost, this may take place in any one of four ways: (1) By the creation of a new right. (2) By the extinction of an existing right. (3) By a combination of those two, *i.e.* the extinction of an existing right and the creation of a new one in its place. (4) By the transfer of an existing right, *i.e.* by succession, which may be *inter vivos* or at death. The discussion of titles in the following chapters will in the main follow the above order, but with some deviations from it to avoid separating things that can more conveniently be treated of together.

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[2] See § 477.

CHAPTER XXXVIII.

OCCUPATION AND SIMILAR TITLES.

Occupation.

567. Occupation or occupancy is the taking possession of a thing which belongs to no one, *res nullius*. If the taker has an intent to acquire the ownership at the time when he takes possession or at any time while the goods remain in his possession, he becomes the owner.

Capture of wild animals.

Wild animals in their natural state of liberty are *res nullius*. Any one may capture or kill them and so make them his own, except so far as this is prohibited by the game laws.

Abandoned goods.

Goods which have been abandoned by their owners are open to appropriation by any one. Abandonment implies an intention on the part of the owner to renounce his ownership. Goods which are lost or mislaid or of which the owner temporarily relinquishes the possession under stress of necessity, as where in a storm at sea a part of the cargo of a ship is jettisoned[1] to lighten the vessel, are not deemed abandoned. Such goods, if afterwards found or recovered, continue to belong to their former owner. But the right of a finder of lost goods, if the owner never appears, is superior to that of any other person.[2]

Lost goods.

Enemies' property.

568. By the common law the property of an alien enemy was regarded as *res nullius*, and any person was at liberty to seize it for his own use. But in modern times the right to capture enemies' property is confined to the government and those persons whom the government has authorized to make captures; and captured property belongs to the government and not to the individual captor. The plunder of private property on land is now regarded as contrary to the rules of civilized warfare. But private property of enemies at sea still remains liable to capture, and private individuals may be licensed to make such captures for their own benefit, the captured goods in that case becoming the property of the captor. Such a license is called a letter of marque or reprisal, and the person acting under it a

Privateering.

[1] That is thrown overboard.

[2] See § 309.

Effect of capture.

privateer.[3] Captured property does not become the property of the captor until it has been brought by him *infra presidia*, that is, into a place of safe custody, and has remained there one night.

Recapture.

If recaptured before that time, it goes back to its original owner. But by the old law if it was recaptured after having been one night *infra presidia* in the enemy's hands, the former owner could not have it again. It had become enemy's property, and belonged to the recaptors. But this rule is now changed, and the former owner has a right to it again on the payment of

Condemnation.

salvage[4] to the recaptors. At present also captured property must be formally condemned by a prize court.[5] Until that is done the captor's title is inchoate merely.

Occupation of land.

569. Land in general can not be acquired by occupancy, because when it is not held by any person it is the property of the King or the state. But there are two cases in which rights in land can be got by occupation or taking possession. The first is where

Ouster.

a person wrongfully takes possession of land and ousts the rightful tenant, by which, as has been said already, he acquires a defeasible estate in the land.

Death of tenant *pur auter vie*.

The other case was where a tenant *pur auter vie* died during the life of the *cestui que vie*. There the estate could not descend to the heir of the tenant, because it was not a fee, nor could it go to his personal representative, because it was real property.

Common occupancy.

Accordingly it went nowhere, and any person was at liberty to occupy the land, and thus gain an estate in it for the remainder of the life of the *cestui que vie*. This was called common occupancy. But at present this is abolished by statute, and the estate, if not disposed of by the tenant's will, goes to his personal

Special occupancy.

representative. But if an estate be expressly given to a man and his heirs during the life of another person, though this is deemed a mere estate *pur auter vie* and not an estate of inheritance, so that the heir can not take it by descent, yet the heir shall have it as special occupant, being the person designated for that purpose in the original grant.

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[3] By the treaty of Paris in 1856, to which Great Britain and most of the European powers, but not the United States, were parties, privateering was abolished as between the signatory powers.

[4] See § 831. [5] See § 193.

570. Accession is where a person aquires a property right in a thing by its being added or annexed to something which he already has. Whenever two things are so united that one becomes accessory to the other, both belong to the owner of the principal thing. Thus if one person builds a house upon another's land, even under an honest belief that the land is his own, or if he uses his materials in repairing another's ship, the owner of the land or the ship becomes the owner of the house or the materials, and need not pay for them. This rule prevails even though the accession is made by the wrongful act of the owner of the principal thing, as where A wrongfully paints his house with B's paint, unless the two can be separated; but in this case the value of the thing thus wrongfully annexed can be recovered from the wrongdoer in an action for a tort. Accession

If one person takes another's materials and works them up, either with or without adding to them materials of his own, which is called specification, as where he weaves another's yarn into cloth or embroiders with his own thread upon another's cloth, the rule of the Roman law was that if the result was to produce an article of a different kind, *e.g.* if wine is made from grapes or garments from cloth, the article belonged to the person doing the work, who was bound to pay for the materials, but if the species was not changed the ownership of the thing remained as before. But the common law gives the product in all cases to the owner of the materials, so long as their identity can be traced. But if the value of the materials was trifling compared with that of the labor, as if an artist should paint a picture upon another's canvas, probably the product would belong to the person doing the work. Specification. Civil law rule. Common law rule. Value of materials trifling.

571. Confusion of goods is where the goods of two persons have become mingled together. If by such means one person's goods have become accessory to those of the other, then, as already explained, the whole belongs to the owner of the principal thing. But when there is no accession, the rules are as follows. If the goods of each owner can be distinguished and separated, as where two flocks of sheep are turned into the same pasture, or logs belonging to different persons marked so as to be distinguishable are thrown into a river and all floated down together, the Confusion of goods. When accession takes place. When the goods can be separated.

ownership is not affected. Perhaps this is not properly a case of confusion at all. If the goods are of the same kind and quality, for instance if wheat of the same grade the property of various persons is stored in the same elevator, or two lots of similar wine are poured into the same barrel, the former owners become owners in common of the mass, and each may take his proportionate share. But if the mixture is by the wrongful act of one owner, any doubt as to the ownership or the proportions belonging to each is resolved against the wrongdoer. If however the goods mixed were not similar, and after the mixture can not be distinguished and separated, as if good wine is mixed with bad or wheat with barley, then if it happened by the wilful wrong of one party, the law, as a punishment for his fraud, gives the whole to the other party. But if the mixture was by consent or accidental or by wrong which was not wilful, *e.g.* by negligence, the parties become owners in common, any doubt however being here also resolved against a wrongdoer.

Mixture of similar goods.

Mixture of dissimilar goods.

By wilful wrong.

Without wilful wrong.

Dereliction and alluvion.

572. Something similar to accession or confusion of goods may happen in the case of land. If by any natural cause, for instance washing by rain, soil is taken from one man's land and deposited upon another's gradually and by imperceptible degrees, it belongs to the owner of the latter land. So if the sea or a river gradually recedes and leaves bare land formerly covered with water, which is called dereliction, or if it slowly deposits sand or silt in front of a person's land and so increases its area, which sort of deposit is known as alluvion, the new land thus made becomes the property of the owner of the adjacent land. But when a large quantity of land is added all at once to a person's premises, as by a landslide or by a river suddenly changing its course, so that it is known where it came from, it continues to belong to its former owner. A new island formed in the sea was given by the Roman law to the first occupant, but by the common law, if it is within the territorial limits of any state it belongs to the government. If it appears in non-navigable water, it belongs to the owner of the subjacent land; but if it is deposited across the boundary line of two or more owners, it seems that it is not divided but they become tenants in common of the whole.

Sudden large additions to land.

New islands in the sea.

In non-navigable waters.

Natural increase of a thing.

573. The fruits or natural increase of a thing are a sort

of accession to it. The fruits of land, for instance crops raised upon it, go to the tenant in possession. So far as the taking the fruits of chattels is a part of the natural and ordinary use of them, they belong to the person who has the right of use. Thus a bailee of a sheep or of a hive of bees with a right of use would be entitled to the wool or the honey; but not a mere precarious possessor, who, although he could take them in the first place for their preservation, and indeed ought to do so, would be bound to account for them to the owner. But in the case of a cow, which must be milked to keep her in health, any possessor ought to milk her and would doubtless have a right to the milk. If, however, his possession was wrongful, the rightful possessor in an action for the wrong could recover also the value of the milk. The appropriation of the young of animals would rarely be a part of the ordinary use of them, and the owner rather than the possessor would generally be the owner of the young. The young belong to the owner of the dam, not of the male; *partus sequitur ventrem.*[6] But cygnets or young swans are divided equally between the owner of the male and the female, because, owing to the habit of those birds of pairing permanently, the father is known and shares with the mother the care of the offspring.

The young of animals.

[6] The same rule was applied to slaves in the United States while slavery existed, following the principle of the civil law rather than that of the common law, by which latter children took the status of their father and a bastard was born free.

CHAPTER XXXIX.

TITLE BY PREROGATIVE.

574. In certain cases property belongs to the Crown, or in the United States to the state or government, by virtue of prerogative.

The King can not be joint owner.

The King can not be joint owner with a private person of any indivisible chattel, but takes the whole in severalty, the other owner losing his right. The same is true of chattels real.

Royal fish.

At common law whales and sturgeon were known as royal fish, and if thrown upon shore or caught near the shore belonged at common law to the King. This rule does not prevail in the United States.

Wreck.

Goods cast on shore from a shipwreck are called wreck, and in former times became the property of the King. By various statutes beginning as early as the reign of Henry I it was enacted that if any living thing[1] escaped from the wreck, or if the goods were so marked that their ownership could be proved, the owners or their representatives might reclaim them within a certain time, which was afterwards fixed at a year and a day.

Derelict.

Derelict is any property found at sea not in any one's custody, for instance goods which have been jettisoned or a vessel deserted by her crew. It includes jetsam, flotsam and ligan.

Jetsam, flotsam and ligan.

Jetsam consists of goods cast into the sea which sink and remain under water, flotsam is where they continue floating on the surface, and ligan where they are sunk but tied to a buoy so as to be found again. These are not deemed abandoned, but continue to belong to the owners. If however the owner did not appear and claim them within a year and a day, they belonged to the admiral as *droits* of admiralty, or, if cast upon the shore and there found, to the King as wreck.

Modern law of wreck and derelict.

In modern times public officers are appointed to take possession of wreck and derelict. If no one claims it, it is sold and

[1] The courts construed this to include any animal, *e.g.* a dog or a cat.

the proceeds turned into the public treasury, but the owner may still have the money on proof of his right.

Gold and silver mines.

575. By the common law mines of gold or silver, though found under private land, belonged to the King. If the mine contained also base metal, some authorities held that the King's right depended upon the value of the gold and silver exceeding that of the other metals. But now by statute in England such mixed mines are not royal mines in any case, but the King may in most cases have the ore on paying for the base metal contained in it. In the United States mines of any sort under private land generally belong to the land owners; but some states in making grants of land have reserved the gold and silver. The statutes of the United States provide for persons' acquiring mining claims, that is, rights to mine for gold, silver or any metal for their own benefit, in government lands by occupancy and actual working, on compliance with certain conditions. This is permitted in order to promote the development of the mineral resources of the country.

Mining claims.

Treasure trove.

576. Treasure trove, *thesaurus inventus*, is gold or silver coin, plate or bullion found hidden in the earth or other secret place. It belongs to the King rather than the finder, unless the owner appears and claims it. In the United States it belongs, as against every one but its owner, to the owner of the land where it is found. But treasure found in the sea or upon the surface of the ground is not treasure trove, and, like lost articles in general, belongs to the finder unless the owner puts in his claim. The distinction is between property presumed to have been hidden, *i.e.* purposely deposited in a place for safety, and property presumed to have been abandoned or accidentally lost.

Waifs.

577. Waifs, *bona waviata*, are stolen goods which are waived or thrown away by the thief in his flight. The common law gave these to the King, as a punishment to the owner for not using diligence to bring the offender to justice. But if the owner do use diligence and immediately pursue the thief, which is called making fresh suit, or afterwards procure his conviction for the crime, he shall have his goods again. Also in any case if the owner can regain possession of the goods before they are seized to the King's use, he may keep them. If the goods are hid by the thief or left in any place, so that he does not have

them about him and throw them away in his flight, they are not waifs. Nor can the goods of a foreign merchant, if stolen, be waifs, perhaps because he, being a foreigner, can not be reasonably expected to make fresh suit. The law as to waifs does not obtain in the United States as against the owner of the goods, though perhaps the state would in theory be entitled to them rather than a mere finder.

Estrays.

578. Estrays or strays are valuable animals found wandering about and whose ownership is unknown They must be proclaimed in the church and in two market towns next adjoining the place where they are found; and then if no owner claims them within a year and a day, they belong to the Crown absolutely. Animals *ferae naturae* or animals upon which the law sets no value, such as cats and dogs, can not be estrays, nor can any fowls except swans. If the owner claims the estray, he must pay the reasonable expense of taking care of it, which is not the general rule at common law when the owner of property takes it back from a finder. In the United States an estray belongs to the finder against any one except the owner, as in case of the finding of lost property generally. When taken up by public officers or delivered by the finder to them, the estray is usually sold after a reasonable period of delay, and the money turned into the treasury of the township or county.

Prerogatives granted as franchises.

All the above mentioned royal prerogatives might be, and often were, granted by the Crown to private persons as franchises. A right to royal fish, wrecks, treasure trove, waifs or strays was a very common franchise of a lord of a manor.

Copyright by prerogative.

579. In England the King has a kind of copyright by prerogative in certain books. As chief executive he has the duty of promulgating the laws, and therefore an exclusive right to print and publish statutes, proclamations and orders in council. As head of the church he has a similar right in the prayer book and official books of divine service. He is entitled also to the same privilege in books compiled or translated at the expense of the Crown. Under these last two principles comes the monopoly of printing the bible. Usually these rights are granted to particular printers for a price paid to the government.

Game laws.

580. Generally every person has a right to kill or take

animals *ferae naturae*. But in England in the case of those animals which are known as game the rights of subjects after the Norman conquest were greatly restricted in favor of the Crown and those persons to whom the Crown granted franchises of forest, chase, free warren, free fishery and the like. Very many statutes both ancient and modern have been enacted in England to regulate the hunting, killing and taking of game and the rights of landowners and others in game. These are known collectively as the game laws. It is not necessary however to state their provisions here.

CHAPTER XL.

ESCHEAT AND FORFEITURE.

Escheat.

581. Escheat means an obstruction in the course of the descent of an estate in fee, whereby the estate is prevented from descending to the heir or to the person who would be the heir. The estate is thereby extinguished, and the land goes back to the lord from whom it is supposed to have been originally received by the tenant or his predecessors. The chance of thus regaining the land by escheat was, as has been explained, an incident of every feudal tenure. In the United States land in such a case goes to the state, and, by an extension of the word beyond its original feudal meaning, this is also called escheat. In order to make his title by escheat complete the lord must enter upon the land or take proper legal proceedings for its recovery. If in the mean time any one else usurps the possession, and the lord recognizes him as tenant, for instance by receiving rent or formerly homage from him, the right of escheat is waived.

Enforcement of the escheat.

Causes of escheat.

Want of an heir.

Escheat is either for want of an heir, *propter defectum sanguinis*, or for the attainder of the tenant, *propter delictum tenentis*. The first happens when a tenant in fee dies and leaves no heir, provided in modern times, since wills of real property have been permitted, he has not disposed of it by will. But when a tenant in tail dies leaving no issue of the class specified in the entail, the land does not escheat but goes to the person who has the next reversion or remainder, who is usually the original donor or his heirs. It has been said that in case of escheat the lord takes as successor to the deceased tenant, as *ultimus heres*. But this is incorrect. Escheat or forfeiture is not a case of succession. The estate is simply annihilated, and what the lord or the state takes is not the estate but the land, in which he then acquires a new estate.

Escheat of personal property.

When the owner of personal property dies leaving no relative to whom the property can go and no will, it goes to the state.

This is often called escheat, but technically that use of the word is incorrect.

Attainder means conviction of treason or felony, which at common law involved the corruption of the blood of the offender. By this is meant that his blood was deprived of all heritable quality, so that not only could he himself not inherit but no one could inherit from or through him. Thus if a father were seized in fee and his son were attainted, and afterwards the father died, the son himself could not be heir; and if the son had died in the father's lifetime leaving a son of his, the succession of the grandson was equally cut off, because in order to inherit he would have had to deduce his right through the son. Therefore the land would escheat. These effects of attainder are now abolished by statute. The constitution of the United States declares that no attainder for treason shall work any forfeiture or corruption of blood, and many of the state constitutions contain similar provisions.

Attainder and corruption of blood

Modern law.

582. Forfeiture is where the tenant or owner of property loses his right to it by some kind of misconduct.

Forfeiture.

At common law the conviction of certain crimes, particularly treason and felony, worked a forfeiture to the Crown of all the offender's property. In the case of real property the effect of the conviction related back, and the forfeiture took effect from the time of the commission of the crime; but only such personal property was forfeited as the party had at the time of the conviction. The lord's right of escheat, in case of a conviction of treason or felony, was subject to the superior right of forfeiture in the Crown; but if the King omitted to enforce his forfeiture for a year and a day, then the lord could have his escheat. Forfeiture for crime has been abolished by statute, and in most of the United States never existed.

For crime.

583. Lands and tenements might at common law be exposed to forfeiture by being alienated or conveyed contrary to law. The effects of a conveyance to an alien or to a corporation are explained elsewhere At common law if a particular tenant attempted to convey by livery of seizin a greater estate than he had, *e.g.* if a tenant for life made a feoffment of the land in fee simple, he forfeited his estate to the next reversioner or remainder man, except where the next estate was a contingent remainder, in which case the

Forfeiture for wrongful alienation.

effect of the forfeiture was to destroy the remainder also, because there was no person in whom it could immediately vest.[1] But a feoffment in fee simple by a tenant in tail did not work a forfeiture, because of the uncertainty and small value of an estate expectant on a fee tail. The reason for the forfeiture was that the conveyance, or rather the possession of the new tenant under the conveyance, would work an ouster of the reversioner or remainder man when the time came for the latter's estate to vest in possession. For whenever a conveyance with livery of seizin was made to a person, purporting to convey to him a certain estate, and he took possession under the conveyance, that amounted to a claim on his part of having such an estate as the conveyance purported to give to him, so that his possession was necessarily adverse as to all persons who had inconsistent claims upon the land. He therefore, as in other cases of usurpation of the possession of land, obtained by his adverse possession at least a defeasible estate such as he claimed to have, and the person actually having the right of possession would be ousted. The forfeiture was a punishment for this wrongful ouster.

Tortious and innocent conveyances.

Thus by the old law any person having the possession of land could by means of a feoffment with livery of seizin convey to a stranger a fee simple, even though he himself had none. It would be a defeasible fee simple, but still a fee simple while it lasted. A conveyance which was capable of having this effect of conferring upon the grantee a greater estate than the grantor had or could rightfully convey, and thus working an ouster of the person in expectancy, was called a tortious conveyance. All common law conveyances with livery of seizin were of this sort by virtue of the livery. Conveyances which transferred no more than the grantor had, and therefore could not work an ouster, were called innocent conveyances. At present, livery of seizin having been abolished, all conveyances are deemed innocent conveyances, and operate to convey only such rights as the grantor can convey, so that the possession of the grantee under them is not adverse to him in expectancy. Therefore forfeiture by a tortious alienation is now obsolete.

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[1] See § 501.

Disclaimer.

584. Disclaimer is where a tenant refuses to render to his lord the services which he owes, and upon the lord's suing for them in any court of record, denies, or disclaims, in court that he holds of the lord, so that his disclaimer appears from the records of the court. Any proceeding by the tenant in a court of record which amounts to a virtual denial of his tenure and which goes upon record there is equivalent to a disclaimer, for instance if he so claims a greater estate than was originally granted. A disclaimer forfeits the tenant's estate to the lord at common law. There is no such forfeiture in the United States.

Breach of custom.

585. Copyhold estates may be forfeited to the lord by a breach of the customs of the manor, which constitute the terms and conditions upon which the estate is held. The fact of the breach must be established by a finding or presentment of the manorial court.

Waste

586. When a tenant had no right to commit waste he formerly forfeited his estate by so doing to him that had the inheritance, and was also liable to pay treble damages. This was by force of the statute of Gloucester.[2] At common law he was only liable for single damages without forfeiture. At present forfeiture for waste is abolished, but in some places treble damages are still recoverable.

Breach of conditions.

The forfeiture of rights by the breach of conditions subsequent has been already mentioned.

Deodands.

A deodand is any chattel which directly causes the death of a human being, as if an ox gores a man to death or a bale of goods falls out of a window upon him and kilies him. It is forfeited to the King, that its value may be distributed *in pios usus*. But the owner can redeem it by paying its value as assessed by a jury, and juries in modern times generally find the value to be some trifling sum. The law of deodands does not obtain in the United States.

Enforcement of forfeitures.

587. It is a general rule applicable to all forfeitures that the act or event which creates the forfeiture does not of itself devest the right. The forfeiture must be enforced by the person entitled to take advantage of it before it has any effect; and

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[2] See § 482.

that person may waive his right to enforce it if he chooses. A forfeiture of an estate in land may be enforced by entry, or of a property right in a specific chattel by taking or demanding possession; and any forfeiture by appropriate legal proceedings, sometimes an ordinary action for possession and sometime proceedings specially provided by law for that purpose.

Waiver of forfeiture.

Any act which is inconsistent with an intention to enforce the forfeiture, *e.g.* receiving after accruing rent from the tenant, if done by the party entitled to the forfeiture with knowledge of his rights, will amount to a waiver of the forfeiture; and so in most cases will an unreasonable delay to enforce it.

Seizure of heriots.

588. Closely resembling forfeitures, though not strictly such, are the heriots due to the lord on the death of a copyhold tenant. These the lord must seize.

Mortuaries.

Mortuaries are a kind of ecclesiastical heriots, being customary gifts due to the parson in certain parishes on the death of a parishioner. From the old practice of bringing the gift to the church at the time of the funeral, it is sometimes called a corse-present.

CHAPTER XLI.

PRESCRIPTION AND LIMITATION.

Lapse of time as affecting rights.

589. If adverse possession or user[1] continues without interruption for a certain period, called the period of prescription or limitation, which is different in different cases, the party acquires the right which he has thus *de facto* exercised. Rights are also extinguished by lapse of time in some cases where there is no adverse possession in the proper sense. These rules are based on grounds of public policy; *quieta non movere.* What has been long established and not disputed is assumed to be rightful. The law will not go back and rip up old matters, when the witnesses may be dead or not to be found, the evidence perished and the right of the case impossible to find out. A person who has been wronged must pursue his remedy promptly or lose it.

Rights are acquired or lost by adverse possession or lapse of time in three ways.

Usucapion.

590. 1. By what is called in the civil law usucapion, *usucapio.* There is no distinctive name for this in the common law. The names limitation and prescription are sometimes applied to it, but improperly; it has also been called acquisitive prescription. The only right which can be acquired in this way is the ownership of a chattel. It has been already explained that the wrongful possessor of a chattel does not by his mere possession acquire any right in it.[2] But if he holds possession of it adversely and uninterruptedly for a period which in most places is six years, the law creates a new right of ownership in him and extinguishes the right of the former owner. However some courts have held that there is no such thing as usucapion or acquisitive prescription in the common law; that the adverse possessor does not actually become the owner of the chattel, but that the effect of the adverse possession is merely to cut off the true owner's remedial right, leaving him still the owner in theory

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[1] See § 311. [2] See § 538.

though unable to vindicate his ownership by an action. In other words, the case is regarded as one of limitation only.

Limitation.

591. 2. By limitation. A remedial right, either a right of action or a right of entry, or a right to take advantage of a condition or forfeiture which is analogous to a remedial right, must be exercised within a time limited by law, which is called the period of limitation. If not, it becomes extinct, and any primary right which might be affected by its exercise can no longer be so affected. The direct effect of limitation is merely to cut off or extinguish a remedial right; there is no creation of any new right as in usucapion, and no direct dealing with any primary right. But indirectly primary rights are practically acquired or lost by it. One who ousts another from his land gets thereby at once, without waiting for the end of the period of limitation, an estate in the land,[3] a defeasible estate, which the rightful tenant can put an end to by entry or action. When therefore the latter's right of entry or action is cut off by limitation, the estate of the wrongdoer becomes indefeasible and absolute. In the same way, if an estate or any kind of a right is forfeited by the breach of a condition, but the forfeiture is not taken advantage of until the period of limitation has expired, the estate or right becomes absolute and the forfeiture has no effect. It is not necessary in such cases for the law to create any new right in the adverse possessor. He has already a right, and it is only necessary to change that right from a defeasible to an indefeasible one by cutting off the true holder's remedy. The period of limitation for rights in land is now usually twenty years; though formerly it was much longer[4] and in some of the United States has been made shorter. The present English statute of limitations as to property does not require that the possession or user shall be adverse. It provides simply that a right to recover property by entry or action having once arisen shall only exist for a certain period. The statutes in some of the United States are similar.

Estates in real property.

Prescription.

592. 3. By prescription.[5] Incorporeal hereditaments and abnormal property rights generally can not be acquired by either

[3] See § 450. [4] See § 592, 903.

[5] The name prescription is derived from the Roman law, where however it had a somewhat different meaning.

usucapion or limitation, since they can not be possessed nor can a person gain an estate in them by ousting the rightful tenant. But after a continuous adverse user for a sufficient time the law will conclusively presume that some one who could do so has granted the right to the party exercising it, and by means of that presumption will in fact confer the right upon him. Prescription in the common law therefore rests upon a fiction, a supposed grant never in fact made, and is in theory a case of succession.

Manner of prescribing.

At common law for a prescription to be valid the user or adverse possession must have been from time immemorial.[6] Therefore a prescription for any right appurtenant to land must always be laid in the tenant in fee. A tenant for life or for years, and *a fortiori* a tenant at will, can not claim such a right in his own name, because his estate could not have existed from time beyond memory. He has to claim it in the name of the holder of the fee, that is, to plead that the tenant in fee simple had the right appurtenant to the land, and had demised the land to him with the right. A tenant in fee must prescribe in the name of himself and his ancestors, or if he is a purchaser or the successor of a purchaser, in the name of himself and those whose estate he has, which last is called a prescription in a *que estate*. At a very early period the beginning of the reign of Richard I was fixed upon as the commencement of the period of legal memory, and any prescription which originated before that date was held good. But as in course of time it became practically impossible to carry the proof of a user back to that remote period, the courts adopted the rule that proof of a user for twenty years should raise a presumption of its having existed for the required period. This presumption, however, was only *prima facie*, and it could be rebutted and the prescription defeated by showing that the user had in fact begun within the period of memory. But now by statute a positive rule of law is substituted for that presumption, and an adverse user for a certain fixed time, generally twenty years, is sufficient for prescription.

Shortening of the period of prescription.

What may be prescribed for.

Since prescription rests upon a presumed grant, it can only arise in a case where a grant might have been made. But a

[6] See § 19.

grant implies definite persons as parties to it. Therefore there can be no prescription either in favor of or against an undefined class of persons; for example the lord of a manor can not prescribe to levy a toll upon strangers, nor could there be a valid prescription that all visitors to a sea side resort might cross a certain piece of land in going to and from the beach. Property, however, can be dedicated to public uses;[7] and dedication is so far similar to a grant that a presumed dedication will serve as the basis of a prescription as well as a presumed grant. Land is often dedicated for highways, and accordingly a highway may exist by prescription.

Presumed dedication.

Rights by custom.

593. Also by a special local custom rights may be created similar to prescriptive rights.[8] Thus a custom that all the inhabitants of a parish might dance on a certain close at certain times for their recreation may be valid.

Persons under disability.

594. The times of limitation or prescription do not run against persons who are under disabilities and unable to assert their rights, such as married women, infants, persons of unsound mind and sometimes other classes of persons. For the principle upon which lapse of time is allowed to affect rights is that the rightful claimant has been guilty of laches in not asserting his claim, and *interest rei publicae ut sit finis litium.* But it would be unjust to permit it to have that effect against persons who were unable to act and therefore can not be charged with negligence; so that these are always allowed a certain time after the removal of their disabilities before the limitation, usucapion or prescription takes effect against them.

No time runs against the state.

By the old law lapse of time conferred no rights against the state; *nullum tempus occurrit regi.* And such is still the general rule; but in certain cases exceptions have been made to it by statute. In theory this is a deduction from the principle that the King can do no wrong; therefore he can not be guilty of any *laches.*

Continuous user.

595. When it is said that the adverse possession must be continuous and uninterrupted, that does not mean that the adverse possessor must be always exercising his right, but that the exercise

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[7] See § 616. [8] See § 19.

must not be interrupted by any temporary abandonment of his claim or by any interference of the party against whom it is claimed. But mere protests by the latter, if he takes no steps to enforce his right, are not interruptions.

Possession through another

The adverse user need not be by the adverse possessor in person. It may be by any one acting under him. Thus if A ousts may tack, that is, add, the time of his predecessor's user to his own to make up the required period. Thus, the period of limitation being twenty years, if A ousts B from his land, and after having held possession for twelve years conveys the land to C, who holds for eight years longer, C will acquire a good title by limitation.

Statutes of limitations

The rules for acquiring rights by adverse possession are now wholly statutory, and the statutes in which they are contained are usually called statutes of limitations. The word limitation is frequently used to include usucapion and prescription as well as limitation in the proper sense, which circumstance has led to some confusion between the three.

CHAPTER XLII.

TITLE BY RECORD.

Title by statute.

596. Property rights are sometimes created, transferred or destroyed by the direct act of the legislature. In England parliament is legally omnipotent, and can dispose of any property at its pleasure; but in the United States the powers of legislative bodies are restricted by provisions in the national and state constitutions that no one shall be deprived of life, liberty or property without due process of law, that private property shall not be taken for public use without compensation, and that no state shall make any law impairing the obligation of contracts, *i.e.* the binding force of agreements. In England, and in the United States when constitutional prohibitions do not stand in the way, if property has become entangled in a multiplicity of estates, rights, claims and restrictions, so that its advantageous and profitable use is seriously interfered with, the legislature will sometimes step in and pass a private act to remedy the difficulty. Such an act may directly wipe out existing rights and create new ones, may authorize a sale of the property and a distribution of the money among the persons entitled to it, or may simply authorize some person who already has rights in the property to deal with in a way different from what he could otherwise do, *e.g.* to make leases. It may also validate some previous conveyance or juristic act which was void through some defect, and so confirm rights intended to have been created. Such statutes should be, and usually are, made with great caution, after a full hearing of all parties interested, and only when justice requires it and a remedy can not be had in any other way. They are regarded rather as an especially solemn form of conveyance than as laws, and like conveyances in general may be declared invalid by the courts if obtained by fraud.

Private acts.

Judicial transfers of property.

In a few cases by general statutes courts are empowered directly to transfer property rights by judgments, decrees or orders. These in modern times have largely taken the place of private acts.

Title by judgment.

But in any case if a property right is in dispute in an action, and the court erroneously decides that it belongs to one party when in fact it belongs to the other, that virtually effects a transfer of the right, because the former owner and his privies are forever estopped to assert their claim.. On this principle were based two methods of conveying real property by means of collusive suits, formerly much in use, known as fines and recoveries. They were mostly used to enable a tenant in tail to convey a fee simple, thus cutting off the entail, and to destroy contingent rights and conditions. They were therefore favored by the courts as means of relieving land from restrictions on its use and free transfer, which has always been the policy of the courts.

Fines.

597. A fine was levied, as the technical expression was, in the following manner. The intended transferee began a suit against the transferor on a supposed covenant by the latter to convey the land to him, which kind of covenant in ancient times the courts of common law would enforce specifically by compelling the covenantor to make the conveyance.[1] The covenant was purely fictitious. The defendant, who was called the deforciant, because he was supposed to be deforcing or wrongfully keeping out the plaintiff from the land,[2] pretending that he had no defence to the action, obtained leave of the court to compromise it, and afterwards, in pursuance of a supposed compromise, made a formal acknowledgement or recognition in court or before an officer of the court of the plaintiff's right to the land. From this he was called the cognizor, and the plaintiff the cognizee. The recognition was entered in the records of the court in what was called the foot or record of the fine; and thereafter the cognizor and his privies were estopped by the record to assert any claim to the land, so that the transaction had the effect practically to convey the estate from the cognizor to the cognizee The foot of the fine usually began with the words *haec est finalis concordia*, whence the name fine. To prevent frauds it was provided by statute that fines should be enrolled in the court of Common Pleas, where actions for the recovery of land were tried, and should be openly read and proclaimed in the court in four successive terms.

Enrolment and proclamation of fines.

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[1] See § 917. [2] See § 875.

Effect of a fine.

By various statutes the effect of a fine with proclamations was not merely to transfer the estate from the cognizor to the cognizee, but also, provided the cognizor really had some estate in the land which he could convey and was not a mere stranger officiously intermeddling with it, to detroy the rights of all other persons in the land unless they put in their claims on the foot of the fine within five years, thus practically putting the transferee, as to those persons, into the position of a person having a defeasible estate with a short period of limitation.

Recoveries.

598. A recovery, or common recovery, was also a collusive suit, which however was not compromised as in the case of a fine but carried through to judgment. The intended transferee, who was called the demandant, brought a suit against the transferor, the actual tenant, for the possession of the land,[3] alleging that he himself was the rightful tenant and had formerly been seized of the land, and that some third person had ousted him and then conveyed the land to the present tenant, which allegations were of course entirely fictitious. The tenant, admitting that he had got his estate by conveyance from a third person, who had warranted the title to him,[4] obtained an order of the court, which in case of a genuine warranty he would have had a right to, requiring his supposed warrantor to come in and undertake the defence of the action. This was called the voucher (*vocatio*) of the warrantor, who was denominated the vouchee. The person named as vouchee, who was some one employed for that purpose, appeared and took upon himself the defence, but afterwards made default or failed to appear on being called, so that judgment was rendered in favor of the demandant, of course erroneously, for the possession of the land, and the tenant had judgment to recover other lands of equal value against the vouchee, as was at that time the right of a person who was deprived of land that had been warranted to him. The person selected as vouchee was however always a person who had no land, usually the crier of the court, who from being frequently thus vouched was called the common vouchee, so that the judgment against him was worthless.

Voucher.

Double voucher

Sometimes there was a recovery with a double, or even a

[3] See § 904. [4] See § 619.

treble or farther voucher. When a double voucher was desired, the tenant first conveyed a freehold estate by deed to some third person, and the action was brought in the first instance against the new tenant, who vouched in the real transferor, who in turn vouched in the common vouchee. The reason for this was that if a recovery were had directly against the transferor it barred only such estate in the land as he was then actually seized of and did not estop him from afterwards setting up any other right, other than an estate, such as a right to take advantage of a condition, which he might afterwards acquire by descent; but if judgment went against him as one who had absolutely warranted the title, he was estopped from ever making any claim.[5]

Effect of a recovery.

A recovery was permitted to cut off the rights of the heir in tail and also all reversions and remainders expectant on the estate of the tenant who suffered a recovery, although the heir and the tenants in expectancy were not parties to the suit and had no opportunity to defend their rights, for which the reason was alleged that the land of equal value which the tenant recovered from the vouchee would go to the same heir or be subject to the same expectancies. To such transparent subterfuges were the courts reduced in their attempts to set land free from entanglements. But to prevent substantial injustice it was enacted by statute that no recovery suffered by a tenant for life should destroy any estate in expectancy unless the reversioner or remainderman was vouched in and made a party to the proceedings, so that his consent to the recovery was necessary.

Abolition of fines and recoveries.

599. Fines and recoveries were never used in the United States, or if they ever were have long since become obsolete; and they have been abolished in England by a statute of William IV, which permits a tenant in tail to alien the land and cut off the entail by a deed, commonly called a disentailing deed.

Letters patent.

600. Grants from the crown or the state are also matters of public record. Usually these are made by formal documents called letters patent, or open letters (*literae patentes*), because they are not sealed up but exposed to open view with the great seal of the state attached, and are addressed to all persons

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5 See § 619, 908.

generally. In this they differ from certain other letters or writs of the King, which, though likewise made under the great seal, are directed to particular persons, and are therefore closed up and fastened, and are called writs close, (*literae clausae.*) Estates in land, franchises and incorporeal hereditaments generally, as well as other kinds of property rights, may be granted by patent. Rights in inventions, as has been explained, get their name of patents from being granted in this way.

Construction of public grants.

Royal or state grants by patent are subject to some special rules of construction not applicable to grants in general. If made at the request of the grantee, such a grant, in case of any doubt as to its meaning, is construed against the grantee and in favor of the King or state; to avoid which rule of construction it is common to insert in the grant a statement that it is made not at the suit of the grantee but of the King's special grace and on his own motion, or equivalent words in a grant by the state or government. A grant by a private person may include things not expressly named, if they are incidental and necessary to the operation of the grant, *e.g.* a grant of land may confer a way of necessity.[6] But a public grant carries nothing but what is expressed. If it appears on the face of the grant itself that it is based upon any mistake or deceit in a material matter, or if it is informal or contrary to law, a public grant is void. Thus a public grant of land to a man and his heirs male is void. It does not convey a fee tail for want of words of procreation, nor a fee simple, as a private grant in the same form would, because public grants are strictly construed and it appears that a fee simple was not intended.

Entries in public offices.

601. Besides formal grants by letters patent, rights may sometimes be had from the state by what is equivalent to a grant by means of records or entries in public offices. Thus copyrights are not conferred in the United States by patent, but are obtained by depositing copies of the work with the librarian of Congress and complying with certain other requirements.

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[6] See § 514.

CHAPTER XLIII.

TRANSFER BY AGREEMENT.

Executed and executory agreements.

602. Property may be transferred *inter vivos* by the agreement of the parties. An agreement which operates as an actual present transfer of the property must be carefully distinguished from a mere executory agreement or contract to make such a transfer at some future time.[1] Where some particular form is required for the actual transfer, an agreement not made in the proper form can not have that effect, even though intended by the parties to have it; but it may amount to a contract to convey or an equitable assignment.[2] All conveyances of real property, including freehold estates in incorporeal hereditaments, must be by deed. An agreement not under seal to transfer such property, even though made in writing, has only the force of a contract or equitable assignment. As a general rule writing is not necessary for a transfer of personal property; but to this there are the following exceptions: (1) cases falling under the statute of frauds and similar statutes,[3] (2) assignments of patents and copyrights; (3) conveyances of ships;[4] (4) transfers of stock in corporations;[5] (5) transfers of negotiable instruments by endorsement; (6) assignments of choses in action in some of the United States. But even where a deed or writing is not required by law it may be, and often is, used for greater certainty and convenience.

Transfers of real property.

Transfers of personal property.

Gifts.

603. A gift, *donatio*, is an agreement whereby an existing right is transferred from one person, the giver or donor, to another, the donee, without any consideration. The name is also applied to other agreements by which rights are created without consideration, such as voluntary contracts by deeds or declarations of trust. Gifts are divided into testamentary gifts, which are made by will, and gifts *inter vivos*. Only the latter are here treated of.

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[1] See § 604. [2] See § 269. [3] See § 333. [4] See § 826.
[5] See § 1026.

Assent of donee.

The assent of the donee is necessary; a gift can not be forced upon a person against his will. It has been already explained that in most cases his assent is presumed.[6] But he can not be compelled to express his dissent in any manner; he may simply refuse to take the gift. These rules as to assent apply to testamentary gifts also.

Delivery.

Delivery is essential to a gift. Without delivery the agreement is a mere promise to give, which is void for want of consideration. In a gift of a chattel, the chattel itself is the thing to be delivered. A gift of land, of an incorporeal hereditament or of a chose in action or other abnormal property right made by a deed or writing is completed by the delivery of the instrument. In an oral gift of a chose in action notice to the party against whom the right avails is equivalent to delivery.

Gifts irrevocable.

A gift once completely made is not revocable by the donor.

Donatio mortis causa.

A *donatio mortis causa* is a gift by a person who is sick and expecting to die, made on a condition subsequent that if the donor recovers the gift shall be void. This differs from a testamentary gift in that it takes effect immediately, but subject to be devested if the donor does not die, whereas a gift by will does not take effect till after the testator's death.

Sale in proper sense.

604. A sale is:[7]

1. An agreement by which the seller, also called the vendor, actually transfers to the buyer or vendee the whole of some existing property right for a price in money. If a right less than the seller has is conveyed, *e.g.* if the owner of a thing gives to another certain rights in it for a limited time retaining the residue of rights himself, as in a letting or loan, the transaction is not a sale. Also a loan of money or of any thing to be returned in kind, although the borrower becomes the owner of the thing, is not reckoned a sale. A sale, though an agreement, is not in the proper sense a contract on the part of the seller, though it is usually called an executed contract; nor if the price is paid at the time is there any contract at all; but in a sale on credit there is a contract by the buyer to pay the price. The seller may also contract to deliver the possession of the thing

Contracts connected with sales.

[6] See § 357.

[7] As to the application of the statute of frauds to sales see § 333.

sold at a future time, the delivery of possession of the thing being different from the transfer of the property right in it, which latter is the essential point in a sale.

2. A contract to make such a transfer at a future time. This is more properly called an executory agreement or contract of sale. In the civil law a sale is always a mere contract, some farther act, usually delivery, being necessary to transfer the ownership. This distinction between an executed sale and an executory agreement to sell is of great importance, though the same name, sale, has unfortunately been applied to both. Executory contracts of sale.

If the price is not reckoned in money, the transaction is not a sale but an exchange; but if it is reckoned in money, it may be paid in anything that the parties choose. Thus if A agrees to let B have his horse for one hundred bushels of wheat, that is an exchange; but if the price is fixed at $100, and A agrees to take his pay in wheat at one dollar a bushel, it is a sale. The rules for exchanges are for the most part the same as for sales. Exchange.

Real property can not be transferred by sale, a deed being necessary, therefore a sale of real property, unless by a deed of bargain and sale, is always a mere executory contract. But personal property can be transferred by sale unless some other form of transfer is required by statute. Sales of real property

605. A person may make an executory contract to sell anything, whether he owns it or not, though if he does not own it he may be unable to perform his contract and be liable in damages for its breach. But as a general rule no one can actually sell a thing which he does not own. Thus if A wrongfully takes B's chattel, even by mistake supposing it to be his own, and sells it to C, who pays its full value for it in good faith, the sale is simply void, and B can retake the chattel from C without repaying him the price. C must get back the money from A, if he can; that is no concern of B's. Seller must be owner.

606. But to this general rule there are certain exceptions. A person may buy the produce of another labor, so that when produced it shall be at once the property of the buyer. Thus a fisherman may sell the contents of the next haul of his net, so that the fish that it contains, which while they were swimming in the sea were the property of no one, belong to the buyer as soon as caught and Sale of produce of labor.

at no time to the fisherman. This, however, is perhaps rather a contract for the hiring of labor than a sale. It is called by the civilians *emptio spei*. Another case of *emptio spei* is the sale of a thing whose existence is uncertain, mentioned in § 359.

Emptio spei.

Fruits or increase.

A person may sell the expected fruits or increase of a thing which he already owns, so that as soon as they come into existence they shall be at once the buyer's property without any farther act of delivery to him, for example the next calf born of his cow. This applies to crops to be raised upon the seller's land, provided the seed has already been sown; but the authorities are in conflict as to whether a yet unplanted crop can be sold.

Sale with warranty.

If a person makes an agreement purporting to be a sale of something which he does not own, and warrants his title, and then afterwards acquires the ownership, he is estopped to controvert the buyer's right, so that the latter becomes the owner by estoppel.

Sale of after acquired property.

An agreement for the sale of "after acquired property," that is, of property which the seller does not own or profess to own at the time of the agreement but which he expects to acquire, is usually a mere executory contract; and even though the seller afterwards acquires the property, it does not pass to the buyer by the mere force of the agreement. But if the agreement provides for the doing of some act, *novus actus interveniens*, after the seller has acquired the property, in order to transfer the ownership, for example if it gives to the buyer the right to take possession of it, a "license to seize," then the original agreement may operate as a *titulus* and the subsequent act as a *modus acquirendi*,[8] and the right in the thing be transferred to the buyer without the necessity of making another agreement of sale. Thus if a manufacturer agrees to sell to a person all the goods of a certain kind that shall be made in his factory for a year, the contract is not a sale of the goods so as to cause them to belong to the buyer as fast as they are made. But if the contract provides that the buyer may come and take them, and he does so, they become his property.

Market overt.

607. In England it has been customary from ancient times to hold in certain towns, which are called market towns, on certain days, which are called market days, an open market or market

[8] See § 278.

overt, to which the inhabitants of the surrounding country and other persons resort to sell and buy goods. Generally tolls are charged to sellers for the privilege of using the market. The right to have a public market and take tolls is a franchise, which may belong to the lord of the manor, a municipal corporation or private persons. In London every week day is market day, and every place where the business of selling goods is regularly carried on is a market overt for such goods as the trader professes to sell. For the convenience of trade in such markets the common law provides that a person who buys anything in market overt in good faith shall become the owner, even though the seller is not the owner and has no right to sell. This rule, however, is subject to a few exceptions. There are no markets overt in the United States.

Sale in market overt.

608. As to whether any given agreement is a complete sale or a mere executory contract to sell, *i.e.* as to the precise time at which the transfer of the right from the vendor to the vendee, which is called the passing of the title, takes place, this depends partly upon rules of law and partly upon the intention of the parties.

When the title passes.

If the law requires the right to be transferred by a formal juristic act, any agreement in which the required forms are not observed is a mere executory contract.

Formal transfer.

If the thing sold is not specific, *e.g.* if A agrees to sell to B one hundred barrels of flour of a certain quality without specifying what barrels, the title will not pass until the goods are delivered or at least are so far set apart and appropriated to the contract that the seller has no longer the power to change his mind and substitute other goods. But if the goods sold are part of a specific mass, for example if A agrees to sell to B one hundred bushels of wheat out of the wheat which he then has in a certain warehouse, or ten sheep out of a flock of fifty, the parties may, if they choose, agree that they shall at once become owners in common of the entire mass in proportion to their respective shares. Where the parties have not clearly expressed their intention on this point, there is some conflict in the authorities as to when such an intention is to be presumed, and various distinctions have been drawn which are too minute to be here gone into. The selection out of the mass of the particular things or

Sale of non-specific things.

Sale of part of a specific mass.

Selection of the things sold.

portion to be delivered belongs to the party who is to do the first act toward delivery; that is, if the seller is to make the delivery he generally makes the selection, but if the buyer is to come and take the goods the selection is in most cases to be made by him.

Sale of specific chattels.

In the sale of a specific chattel, the time when the title is to pass, *i.e.* whether the agreement is a present sale or an executory contract, depends upon the will of the parties; they may make any sort of an agreement that they please. But in the absence of any agreement to the contrary, the general rule is that the thing sold becomes the property of the buyer immediately, even before delivery; that is, delivery is not generally necessary to perfect the sale of a specific chattel. Thus if A sells to B his horse which is at that time in his stable at a distance from the place of sale, and B agrees to come the next day and take the horse and pay the price, the horse becomes at once the property of B, and if it dies before the time of delivery B must nevertheless pay the price. *Res perit domino.* If however the chattel is not yet in a condition to be delivered but something remains to be done to it to fit it for delivery, the title does not pass by the mere agreement of sale. If something is to be done not to fit it for delivery but merely to ascertain the price, such as weighing or measuring, the rule is different in different jurisdictions.

Chattel not ready for delivery.

Delivery to a carrier.

609. When delivery is necessary to pass the title, delivery to a common carrier for transportation to the buyer is usually sufficient. If A orders goods fron B by letter, and B ships the goods to A by vessel or railroad, the goods generally become the property of A as soon as they are put on board. A sale of goods "free on board" means that the seller is to pay the expense of delivery to the carrier, but not the carrier's charges for transportation.

Stoppage *in transitu.*

610. If goods are sold on credit and forwarded to the buyer by a common carrier or by any carrier who is not the buyer's agent or servant, and the buyer becomes insolvent, the seller may stop the goods at any time before they have reached the end of the transit and come into the buyer's possession or control, and retake them, even though they have become the property of the buyer and the time of the credit has not expired. This is called stoppage *in transitu.*

Time of delivery and payment.

611. In the sale of a chattel, if immediate delivery is possible and the parties do not otherwise agree, it is implied that the chattel is to be delivered and the price paid at once; and if the parties separate without doing so, the sale is off. But they may, if they see fit, contract for delivery or payment at a future time. Generally in a sale the delivery of the thing sold and the payment of the price are concurrent conditions, the seller need not deliver unless he is paid or the buyer pay unless he receives delivery. If however different times are fixed for delivery and payment, or if the sale is on credit, this is not so; but in such a case the act which is to be done first is usually a condition precedent to the other.

Delivery and payment as conditions.

Place of delivery.

The general rule is that the thing sold is to be delivered in the place where it happens to be, that is, the buyer must come and take it and the seller need not forward it to him. If it is sent to the buyer, he may have a reasonable opportunity to examine it before acceptance, and may reject it if it is not the same thing, or in the case of the sale of a non-specific thing the same kind of thing, which he bought or ordered; but as a general rule he can not reject it merely because it is defective or of bad quality. If he rejects it, he need not send it back, but should notify the seller. He may, if he chooses, store it in some proper place at the seller's risk and expense; but if he does not, he must not abandon it, but must take care of it for the seller.

Examination and rejection by buyer.

Retention of possession by vendor.

612. When a chattel is sold the possession of it ought regularly to be delivered to the buyer. If it is suffered to remain in the seller's possession, there is a certain presumption that the sale was only a pretended one and that it was fraudulent as against the creditors of the seller or any person to whom he may afterwards sell or mortgage the chattel, so that such persons may disregard the previous sale and seize or keep the chattel. As to the nature and strength of this presumption three different rules prevail in different places.

Presumptions of fraud.

(1) That the presumption is a conclusive presumption of law, which can not be rebutted by proof that the transaction was in fact free from fraud; though it may be by showing some reason for the seller's retention of possession which the law regards as sufficient.

(2) That it is a *prima facie* presumption of law only, which the parties may rebut by evidence of good faith and honest intention on their part.

(3) That the presumption is merely one of fact; *i.e.* that the retention of possession by the vendor is some evidence to show fraud, but that the question whether the transaction was in fact fraudulent is one of pure fact to be decided upon all the evidence.

Warranty.

613. A warranty is a contract made by the seller with the buyer about the thing sold. It is a separate and collateral contract, not a part of the sale, though usually made in connection with it. If it is entered into at the time of the sale in the course of the same transaction, the consent of the vendee to buy is a sufficient consideration for it; but if made afterwards, it requires a new consideration. A warranty is either of title, *i.e.* that the seller has the right which he agrees to transfer and may lawfully and effectually transfer it, or of quality, *i.e.* that the thing sold has certain qualities, for example that a horse is sound and free from vice. A general warranty that the thing is sound, perfect or in good condition does not extend to patent and obvious defects discoverable by ordinary examination, if the buyer has an opportunity to inspect. Thus if a carriage were sold with a warranty that it was in perfect condition, and it lacked one wheel, that would not be a breach of the warranty. The warranty would be construed to mean that it was otherwise perfect. But if the carriage was in some distant place where the buyer could not see it, and he did not know of the defect, the rule would be different.

Patent defects.

Express and implied warranties.

A warranty, like other contracts, may be express or implied. The parties may make any kind of an express warranty that they please. A warranty is not implied against the expressed intention of the parties, but in the absence of such a contrary intent the law implies certain warranties.

Implied warranty of title.

If the goods sold are not specific, the seller impliedly warrants his title In England the same principle applies even though they are specific; but in the United States the rule best supported by the authorities seems to be that the seller of a specific chattel is only deemed to warrant his title if the chattel at the time of the sale is in his possession.

Implied warranty of quality

As a general rule there is no implied warranty of quality when a thing is sold. The rule of law is *caveat emptor*. If the buyer does not exact an express warranty, he must take the thing with all its defects. However in a few cases warranties of quality are implied.

Warranties by manufacturers.

When the seller of a chattel is also the manufacturer there is in general an implied warranty that the article is free from latent defects due to bad materials or bad workmanship, at least such defects as the maker could have detected and prevented by the use of due care.

Also if an article is ordered from a maker for a particular purpose of which the maker has notice, he is usually held to impliedly warrant that the article shall be reasonably fit for that purpose so far as depends upon materials and wokmanship.

Wholesomeness of provisions.

The authorities differ as to whether in the sale of provisions there is an implied warranty by the seller that they are wholesome, so far as that depends upon their sound condition and freedom from impurities. Probably there is such a warranty when they are sold to consumers for use, but when they are sold as merchandise between merchants the rule is very doubtful.

Goodness of commercial paper.

In the sale of commercial paper, such as bills of exchange and promissory notes, there is an implied warranty that the signatures on the paper are genuine and the parties capable of contracting, and also that, so far as the seller knows, the instrument is not worthless because of the insolvency of the parties to it and has not been dishonored.

Effect of breach of warranty.

614. Since a warranty is a separate contract from the sale, a breach of the warranty does not make the sale voidable. The buyer can not refuse to accept the thing bought or can not return it after acceptance and demand repayment of the price, because it is not what it was warranted to be.[10] His only remedy is to sue the seller for the breach of his contract of warranty. At common law a breach of warranty was also regarded as a kind of fraud, and could be sued for as a tort; but that is probably not the law at present.

Bills of sale.

615. A bill of sale is a written transfer or assignment of

10 In some of the United States, however, he may rescind the sale.

personal property other than chattels real. It may be under seal or not as the parties choose, but usually is not. If made without consideration, it amounts to a gift.

Dedication.

616. Dedication to the public, which consists in putting a thing into a situation where it is open to public use with an intention to confer upon the public a right of use, is a kind of gift, and as in the case of gifts generally the acceptance may be presumed. An author dedicates his work to the public when he publishes it without having it copyrighted. The most common case of the dedication of material things is where a person makes a new road and throws it open to the public for use as a highway. Acceptance here is by the public actually making use of it or by the proper highway authorities taking charge of it in the name of the public.

CHAPTER XLIV.

DEEDS OF REAL PROPERTY.

Form and parts of a conveyance

617. No particular form of words is absolutely required in a deed of real property except the word heirs or successors to convey a fee and words of procreation for a fee tail. But certain forms have been established by usage. The regular and usual parts of a deed of conveyance are as follows.

Premises.

(1.) The premises. This part of the deed contains the introductory words; the names and descriptions of the parties; the date in an indenture; any recitals or statements which may be necessary or useful for a proper understanding of the matters afterwards mentioned in the deed, which are usually introduced by the word "whereas;" the statement of the consideration and an acknowledgement of its receipt, though in common law deeds a consideration is not necessary to make the deed valid unless the case is one where a gift would be presumed fraudulent;[1] the operative words, that is, the words which express the conveyance, which are usually inserted twice, once in the perfect and once in the present tense, *e.g.* "have given and granted and do by these presents give and grant;" and the description of the property conveyed, *i.e.* of the thing, the description of the estate or right usually and regularly coming elsewhere, though sometimes inserted here. From the description of the land being usually found in the premises of the deed, the word premises has come into general use to denote the land itself.

Habendum and *tenendum*.

(2.) The *habendum* and *tenendum*, rendered in English by the words "to have and to hold." The office of the *habendum* is to specify the estate granted, *e.g.* in a conveyance of a fee simple the *habendum* specifies that the estate is to be held to the grantee "and his heirs forever." The original purpose of the *tenendum* was to describe the tenure on which the estate was to be held; but that is now omitted and the *tenendum* is reduced to the mere words "and to hold."

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[1] See § 321.

Reservations and exceptions.

(3.) The *reddendum* or reservation; whereby the grantor reserves to himself some new right out of what he has granted. A reservation differs from an exception, in that by the latter some part of the thing itself which is granted is excepted out of the operation of the deed, whereas by a reservation a new right is created. Thus if a man conveys the whole of his farm except a certain piece which is used as a burying ground, that is an exception, the burying ground is a part of the farm itself; but if in the conveyance he reserves to himself a right of way across the land conveyed, that is a new easement. A reservation must be to the grantor himself or to some one of the grantors, not to a stranger; except that feudal services due to the lord may be reserved to him. If rent is to be paid, that is a proper subject of a reservation, and should be inserted in the *reddendum*.[2] There may be also a covenant by the tranferee to pay rent. Generally when rent is reserved a covenant to pay it is also inserted. The usual form of words in the *reddendum* is "yielding and paying" for rent and services, and "reserving and excepting" for easements. An exception may be mentioned in the description of the thing conveyed in the premises, or immediately after the *reddendum*.

Conditions.

(4.) Conditions, when there are any, generally follow the *reddendum*, introduced by the words, "on condition," "provided" or "the condition of this deed is such that if."

Covenants.

618. (5.) Covenants, or contracts between the parties, often occur in deeds of conveyance. What are called the usual covenants, or collectively full convenants, are the following, which are made by the grantor to the grantee.

Seizin.

The covenant of seizin, that the grantor is well seized of the premises and has good right to convey them, means that at the time of making the deed he has actual seizin of a freehold estate in the land which he can convey by the deed. It refers to the present, not to the future, and is broken, if at all, as soon as the deed is delivered. Such a covenant, however, would be satisfied if the grantor had any freehold estate, even a defeasible one as a disseizor; hence it is customary for him to

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[2] See § 523.

covenant that he is seized of a good and indefeasible estate in fee simple, or whatever estate he claims to have.

Quiet enjoyment

The covenant for quiet enjoyment is to the effect that the grantee shall quietly possess and enjoy what is granted him without any interference by the grantor or his successors or any one having a lawful claim to the premises. This does not bind the grantor to protect the grantee against the wrongful acts of outsiders, for which he is not responsible, but means that there shall be no one who shall have a right to interfere. This covenant looks to the future, and is not broken till an interference actually takes place.

Against incumbrances.

The covenant against incumbrances is that there are at the time of the conveyance no mortgages, liens, easements, charges or burdens of any kind on the land. If there are any such, they should be mentioned and excepted out of the covenant. This covenant also can be broken only at the time when it is made.

Farther assurance.

The covenant for farther assurance provides that if for any reason the deed shall be found not to convey all that it purports to convey, *e.g.* because of any informality or because the grantor has not such an estate as he supposes himself to have, he will make or procure to be made, on request, any farther deed or assurance that may be necessary. Formerly it was very common to insert a covenant that the grantor would levy a fine or suffer a recovery at the grantee's request.

Warranty.

619. Warranty is a covenant whereby the grantor agrees to warrant and defend to the grantee the estate granted. This does not bind him to defend it against the acts of mere wrongdoers, but against all claims and attacks by persons deriving their title from him or asserting a title superior or paramount to his own, *e.g.* if the grantor was a mere usurper or a person who had taken possession of the land on the death of the preceding tenant mistakenly supposing himself to be heir to the latter, he would be bound to defend his grantee against the claims of the rightful tenant or heir. A covenant of warranty is not broken until the grantee is actually evicted by the adverse claimant. In ancient times the warrantor in such a case was bound to give the grantee other lands of equal value; but at present he must

make a compensation in money. If the grantee, on being sued by the adverse claimant, vouches or calls in the warrantor to defend for him, as he may do, a judgment against him is conclusive evidence against the vouchee that the warranty has been broken, and he may have at once a judgment for compensation against the vouchee.

Implied warranties.

Even without an express warranty, a contract of warranty is sometimes implied. In a feoffment the operative word was *do* or *dedi*, and generally the use of that word or its English equivalent "give" or "have given" in a conveyance of land imports a warranty. Also if after a partition or exchange of heritable lands one party is evicted under a superior title, the others shall compensate him for his loss, because they enjoy the equivalent; and when on a conveyance in tail or for life rent is reserved, the reversioner and his heirs to whom the rent is payable are under a similar obligation. However in some of the United States implied warranties in conveyances of land are abolished by statute.

Conveyance by estoppel.

If a person makes a conveyance with warranty of land in which he has at the time no estate or has not the estate which he pretends to convey, and afterwards he acquires an estate, he is estopped by his warranty from ever setting up any claim to the land, so that his deed, which was at the first void, becomes effectual by this estoppel.

Warranty binds heirs.

620. An express warranty is usually made by the grantor in terms for himself and his heirs. In such a case the rule that a person may bind his heir by his specialty contracts to the extent of the assets which the heir receives from him applies. As to the heir a warranty is lineal or collateral. If the heir could have succeeded to the land to which the warranty applies from or through the ancestor who made the warranty, it is lineal; otherwise it is collateral For instance, if a father conveys with warranty his own land which would have descended to his son, this is a lineal warranty as to the son. But if a married woman should die seized in fee simple of land and leaving a husband and a son, and the husband, not being his wife's heir but taking a life estate in the land after her death as tenant by the curtesy, should make a conveyance of it in fee

Lineal and collateral warranties.

with warranty, this warranty would be collateral as to the son, who would be heir to both his parents, but would inherit that particular land from his mother and not from his father.

Obligations of the heir.

Under either kind of warranty the obligation of the heir to give the grantee other lands in case he was evicted was conditional upon the heir receiving from the warranting ancestor by descent assets sufficient to enable him to do so. But if the warranty was a lineal one, the heir, whether he received assets or not, could never himself set up any claim to the very land warranted; because if he had other assets, still there would be no gain in his taking the land from the grantee only to replace it by other land, and if he had no other assets, then if he successfully asserted a right to the warranted land, that would at once become assets in his hands and he would be obliged to restore it to the grantee. The same would be true in case of a collateral warranty, if the heir received other assets from the warranting ancestor; there would be no reason for permitting him to oust the grantee from the land warranted when he would at once come under an obligation to give him other land of equal value. But the rule as to collateral warranties was extended, contrary to both justice and logic, to cases where the heir received no assets from the warranting ancestor. If he had any other right to the land, he nevertheless could not assert it aginst his ancestor's warranty. Thus in the instance just mentioned of a son taking land by descent from his mother and being also heir to his father, he would be bound by his father's warranty even though he had in fact inherited nothing from him. The reason for this is said to have been the possibility that the heir might at some time receive something indirectly from or through the ancestor. At present collateral warranties have in most places been abolished.

Abolition of collateral warranties.

Covenants running with the land.

621. Covenants contained in a deed, or agreements in a lease even though not under seal, sometimes, as the expression is, "run with the land." That means that they may be enforced by or against not only the immediate parties but those who succeed to their rights in the land. Thus if A conveys land to B and warrants his title, and B afterwards conveys to C, and C is evicted by some one having a paramount title, C may sue A for the breach of warranty. This was permitted at common law,

contrary to the general common law rule that contract rights are not assignable.

What covenant, run with the land at law.

At law only such covenants run with the land as relate to the possession or use of the land itself or something *in esse* upon it at the time of the covenant. Thus those of the usual covenants mentioned above which relate to the future run with the land so that they enure to the benefit of any future tenant, and the burden of a covenant to keep existing buildings in repair rests upon any one who becomes tenant, so that he can be sued for non-performance. But a covenant by a grantee or lessee to erect new buildings upon the land is personal only and does not run with the land, those buildings not being *in esse* at the time of the covenant; and the same is true of a covenant to do some act not connected with the land at all, for instance, to pay a sum of money.

Covenants running with the reversion.

At common law no covenants ran with the reversion; that is, if a lessee covenanted to pay rent or the lessor to make repairs, and then the lessor granted away his reversion, the covenants could not be enforced by or against the new landlord. But by a statute of 32 Henry VIII such covenants run also with the reversion. And even at common law if rent was reserved in a deed, and the reversioner granted away his reversion, the new reversioner was entitled to the rent, which was incidental to the reversion.

Running of covenants in equity.

But in equity the rule is wider. Any contract touching land may, if the parties choose, be made to run with the land or the reversion, so that a court of equity will enforce it in favor of or against a future tenant or reversioner, or even in favor of or against a tenant of other land, unless the tenant acquired his estate for valuable consideration without notice of the contract, in which case the general principle applies that an equity attaching to a right *in rem* will not be enforced against a person who acquires the right in good faith and for a valuable consideration.[s] Thus if the owner of a large tract of land divides it into building lots and sells and conveys the lots to different purchasers, inserting in each deed a restriction against certain uses of the

[s] See § 271.

land which are calculated to make the neighborhood undesirable for residence, such as the carrying on of certain trades, a purchaser of any lot may usually enforce the restriction in equity against the purchaser of any other lot, though he was not a party to the latter's deed.

Covenants distinguished from grants etc.

A covenant running with the land, which is a mere contract creating a right *in personam* only, must be distinguished from the grant of an easement in the land or from a charge upon the land, which creates a right *in rem* in the land itself.

Attestation clause.

622. At the end of the deed comes the conclusion or attestation clause, mentioning the execution of the deed and the date or referring back to the date mentioned in the premises. This usually begins with the words: "In testimony whereof." Then follow the signatures and seals of the parties.

Witnessing and acknowledgement.

Deeds of land must now be attested by witnesses or acknowledged by the parties before some public officer appointed for that purpose. Sometimes both witnesses and acknowledgement are required.

Common law deeds.

623. Deeds may be divided into common law deeds and deeds operating under the statute of uses. The former will be first considered.

Feoffment.

Feoffment, as already explained, was a juristic act by which any freehold estate in corporeal things could be created. At first it was merely oral or symbolic, but in course of time deeds of feoffment came to be used, and the statute of frauds made oral feoffments invalid. The deed of feoffment is the oldest and simplest of all the common law deeds, and is the appropriate form for the conveyance of an estate in fee simple. Indeed it is the only common law deed by which a fee simple can be conveyed. The usual operative words were "give" or "have given," (*do* or *dedi*), though "grant," "enfeoff" or other equivalent words might be used. A deed of feoffment had to be followed by livery of seizin, without which it had no effect as a conveyance. But livery of seizin is now abolished.

Gift.

624. A gift is the proper conveyance for a fee tail. It has the same operative words as a feoffment, and is exactly similar to it in form save for the insertion of the words of procreation which are necessary to make an estate tail. It too must

be followed by livery of seizin. The word gift, however, is often applied to a feoffment.

Grant.

625. A grant, *concessio*, is the regular common law method of conveying incorporeal hereditaments. It is substantially similar in form to a feoffment, and the words gift and grant are often used interchangeably, and the parties to any transfer of property rights are often called grantor and grantee. The ordinary operative words are "have given and granted" (*dedi et concessi*)

Things lying in livery and in grant.

On a grant of an incorporeal thing there can of course be no livery of seizin; for which reason such things are said to lie in grant, while corporeal things lie in livery. An estate in expectancy in a corporeal thing, though it can not be created by grant, yet lies in grant after it has been created *e.g.* a remainder in land created by feoffment or gift may be conveyed by grant.

Lease.

626. A lease or demise is a conveyance for life, for years or at will, usually but not necessarily reserving rent, made by a person who has a larger estate, so that a reversion is left in the lessor. The ordinary operative words are "demise, lease and to farm let" (*demisi, concessi et ad firmam traditi.*) Farm meant originally provisions, then rent, because rents were in ancient times commonly payable in kind. A farmer (*firmarius*) was one who held his lands upon rent. Afterwards farm came to signify the land itself. Livery of seizin was necessary at common law if the estate granted was a freehold; and in other cases the lessee must enter under his lease, as is still the law; until this is done he has only *interesse termini*. For an estate less than freehold the common law did not require a deed, but a lease for years or at will could be made by an unsealed writing or even orally.

Statute of frauds.

The statute of frauds, however, requires leases for more than three years to be in writing. Regularly a lease made by any

Duration of a lease.

tenant has no force beyond the duration of the estate of the lessor, since the estate conferred by it is a part of the lessor's estate and must come to an end with that. Thus if a tenant in tail or for life makes a lease for a hundred years, as he may do, because the estate for years is a less estate than his own, the lease is good so long as he lives, but is invalid after his death against the heir in tail or the remainderman

or reversioner In some cases, however, statutes, known as enabling statutes, have conferred upon certain tenants power to grant leases for terms of years which may extend beyond the duration of their own estates, and similar powers are often given by will. Thus if a tenant in fee simple dies and leaves his land to his wife for her life, he may, for the purpose of enabling her to get the benefit of the land more fully, empower her to make leases of it which may extend beyond her own life. Powers to lease.

627. An exchange is a mutual gift of equal estates, not necessary equal in value or in the quantity of land, but in the quantity of right, as fee simple for fee simple, a term for a term of equal length; but an estate for life, for instance, could not be exchanged for a term for years however long. The necessary operative word is "exchange," no other can be substituted. Livery of seizin was not necessary at common law, but entry on both sides was required. If either party died before making entry, the exchange failed. Exchange.

A deed of exchange is a single indenture executed by both parties; but an exchange may be, and at present usually is, effected by separate deeds of conveyance from each party to the other. In that manner any two estates may be exchanged, whether equal or not.

628. A partition is a deed by which co-parcenors, joint tenants or tenants in common divide the land among them in severalty. Livery of seizin was necessary when it would have been on an ordinary conveyance from one to the other. At common law co-parcenors, where any one could compel a partition, might have made it by parol; but by the statute of frauds a deed is required in their case also. Partition

629. A release is a deed by which some right in land is extinguished or is conveyed to a person who already has a right in the land with which the right conveyed will merge or coalesce. A release can not be made to a mere stranger who has no right in the land. Thus a person who has an easement in another's land may release it to the tenant of the land, the effect of which is to destroy the easement. Or one joint tenant may release to another, a reversioner or remainderman to the particular tenant on whose estate his own is immediately expectant, or a person Release

who has been ousted to the usurper, in which cases the release has the effect of a conveyance or transfer of the releaser's right to the releasee, and a merger of the two rights results. But the seller of land can not convey it to the buyer by a mere deed of release. Even possibilities which can not be assigned may usually be released, *e.g.* the right to take advantage of a condition subsequent may be released to the holder of the conditional estate, which extinguishes the condition. The operative words in a release are "remise, release and quitclaim."

Confirmation.

630. A confirmation is a deed whereby a person who has a right to avoid a transaction or an estate ratifies and confirms it. Thus a grant of an estate by an infant is voidable, but he may confirm it after he comes of age; or a conveyance obtained by fraud or duress may be confirmed. The usual operative words are "give, grant, ratify, approve and confirm." It is said that a perfectly void estate, as distinguished from one that is merely voidable, can not be confirmed, there being nothing to confirm. The release of a reversion or remainder to the particular tenant is also sometimes called a confirmation.

Surrender.

631. Surrender (*sursumredditio*) is the conveyance by a particular tenant of his estate to the person having the next estate in expectancy, so that the estate surrendered is merged in the other. The ordinary operative words are "surrender, grant and yield up." Livery of seizin in case of freehold estates was not necessary, the surrenderee being already seized in expectancy. Copyhold estates, it will be remembered, are transferred only by a surrender to the lord and a regrant by him to the transferee. At common law an estate for years not created by deed or an estate at will or by sufferance might be surrendered without a deed or any writing. And this may still be done except where the statute of frauds requires a writing; any such estate which may be created without writing may be surrendered in like manner.

Assignment.

632. A deed of assignment in the widest sense is any deed by which a person having a property right conveys the whole of it to another, not, as in a lease, retaining any reversion in himself. This would include feoffment, gift, grant, surrender and some releases. But the name is usually confined to

deeds which do not come under any of those heads; for instance an assignment is the proper form of deed when a tenant for life or years conveys his entire estate to a stranger who had previously no right in the land. The most usual operative words are "assign, transfer and set over." Livery of seizin was necessary at common law to the assignment of a freehold estate in possession.

Defeasance

633. When an estate or right is given upon a condition subsequent the most usual course at present is to insert the condition in the original deed of conveyance. But it may be put into a separate deed, called a defeasance, which is executed by the transferee back to the transferor, and provides that the right conveyed by the original deed shall be forfeited upon the condition named in the defeasance. At common law mortgages were usually made in this form. If the defeasance is executed at the same time as the original deed, it is regarded as a part of that deed, and the condition has the same validity as if it were inserted therein. But if an estate has once been completely conveyed by a common law conveyance, it can not be made conditional or subjected to any farther condition at law by a defeasance afterwards executed, though such a defeasance may sometimes be enforced in equity by compelling the grantee to reconvey the estate if the condition is broken. But if the right originally conveyed is executory in its nature, requiring farther acts to be done by the grantor to make it available, as in the case of rents, annuities, warranties and covenants, it may be qualified by a subsequent defeasance.

Deeds under statute of uses.

634. Deeds operating under the statute of uses are next to be taken up.

The creation and transfer of uses

The creation and transfer of uses were never subject to the strict feudal rules which governed common law estates. At first a deed, or even writing, was not necessary, and a mere oral agreement was sufficient to raise or convey a use. But this being found inconvenient and conducive to fraud, a deed or writing was made necessary by the statute of frauds as in the case of legal estates. But livery of seizin was dispensed with; indeed there could be no livery made of a use, which was a mere incorporeal right. Since, when a use was executed by the statute, the legal

Effect of the statute of uses.

estate passed only after a use had been completely created, until the use had come into existence there being nothing for the statute to operate upon, it followed that after the enactment of that statute it became possible to create and transfer legal estates in any manner in which a use could be created, and with equal disregard of feudal rules Hence arose a number of forms of deeds which operated by creating a use that would be immediately executed by the statute, the object of which was to transfer estates secretely and without livery of seizin; and these largely superseded in practice the older common law deeds because of their greater convenience.

Resulting uses.

635. It was a rule of equity, so long as uses remained merely equitable rights, that unless a contrary intent was expressed the use belonged to the party who furnished the consideration. If an estate was conveyed to A for a consideration paid by B, A was considered to hold to the use of B; and in a conveyance without any consideration the grantee would hold to the use of the grantor, so that the conveyance, though good at law, was practically null in equity. This was called a resulting use. But a resulting use was based on a presumed intention of the parties that such a use should exist, which presumption might be rebutted and the use prevented from arising by proof of a contrary intention. Evidence to rebut such a use or equity might be *dehors* the deed, this being one of the cases mentioned in § 346 where parol evidence is admissible to explain a written instrument. When uses were transformed into legal estates, these equitable rules continued to be applied, so that, although at common law a

Consideration in common law deeds.

deed generally required no consideration, it became necessary, or at least expedient, to insert in every conveyance either a statement of a consideration or an express declaration of a use in order to prevent a resulting use from arising. The consideration need not be a valuable one, a good consideration is sufficient for this purpose. Nor for the purpose of rebutting a resulting legal use is it necessary that there should be any consideration in fact; a statement in the deed of a consideration is enough even though false, the parties being at law estopped by the deed to deny it. A declaration of the use is generally inserted in a deed at the end of the *habendum*. If the conveyance is really

for the grantee's own benefit, the declaration is that he is to hold to his own use.

Covenant to stand seized.

636. A covenant at common law did not create or transfer any right *in rem*, but was a kind of contract creating an obligation, and for this purpose did not require a consideration. But a covenant for a sufficient consideration will raise a use. If a man seized of real property covenants in consideration of love and affection, which is a good consideration, or of marriage, which is a valuable consideration, to continue seized of the same to the use of a near kinsman—*i.e.* that without any conveyance to a feoffee to uses he will himself take the place of such a feoffee and hold it to the kinsman's use,—which is called a covenant to stand seized to uses, this will raise a use in favor of the covenantee, which the statute will execute and give him an estate accordingly. But such a covenant will not raise a use in favor of a stranger.

Bargain and sale.

637. A deed of bargain and sale is a covenant for a valuable consideration to sell one's land presently to another. Although in general a sale of land is not a conveyance but a mere contract which has to be performed by a subsequent conveyance, yet such a covenant, purporting to be a present sale, will raise a use to the bargainee and so, the statute executing the use, will operate as a conveyance. The usual operative words are "bargain and sell." But a contract by deed to convey land at a future time is not a bargain and sale. As it was foreseen that by means of such deeds it would be possible to make secret conveyances of land which might be used to commit frauds, the same parliament which passed the statute of uses also enacted that no bargain and sale should be valid to pass a freehold estate unless it were by indenture and were enrolled or recorded within six months in one of the courts at Westminster or with the *custos rotulorum* of the county where the land lay.

Enrolment.

Lease and release.

638. But bargains and sales of chattel interests, though, if the bargainor was himself seized of a freehold estate, they were executed by the statute of uses, were excepted out of this latter statute. This omission led to the introduction of the next species of conveyance, by lease and release, which was invented by Sergeant Moore soon after the statute of uses, and became in England

the most common kind of conveyance of lands. This required two
The lease. deeds. The first, called the lease, was a bargain and sale for one year, which being executed by the statute of uses immediately gave the bargainee an estate in possession for one year in the land without any entry by him or enrollment of the deed. He being thus in possession was capable of having a common law
The release. release made to him; and accordingly by a release, dated usually the day after the lease, whatever estate it was desired that he have, for instance a fee simple, was conveyed to him.

Declaration of uses. **639.** When a conveyance is made to uses it is not necessary that the uses be declared in the deed of conveyance itself or even at the same time with it. Parties may make a deed beforehand specifying certain uses and declaring that the con-
Deed to lead uses. veyance when made shall be subject to those uses. This is called a deed to lead the uses. Such a deed was often made in contemplation of a future fine or recovery. Or the conveyance may simply state that it is upon uses to be afterwards declared, and then a subsequent deed may be made declaring the uses.

Powers of appointment. **640.** Regularly this should be done by the party making the conveyance. But he may confer the power to do so wholly or in part upon another person. Such a power is called a power to appoint to uses or a power of appointment. It is a facultative right. Thus land may be given to the use of A for his life, and after his death to the use of such persons as A shall by his will appoint, where A takes a life estate with a power to appoint the fee. A common law estate can not be appointed, but only a use. Powers of appointment were unknown to the common laws but came in under the statute of uses. An appointment is not a conveyance. The person to whom it is made does not take his estate from or through the person making it, but directly under the deed by which the power is created. It is the same as if, the uses appointed had been originally declared in the deed.

A power is discretionary. A power to appoint to uses is at law wholly discretionary, and also in equity unless it is given in trust. The courts can not compel the donee of a power to exercise it, nor, so long as he acts within the limits of the power conferred, control the
Powers in trust. manner of his exercising it, however unwise that may be. But if a power is given to a person in trust to be exercised for the

benefit of another person or a class of persons, equity will enforce the trust and compel an execution of the power, or if the donee of the power dies without making any appointment, the court will decree the property to the persons in whose favor the appointment ought to have been made.

Revocation of uses.

641. The maker of a conveyance to uses may reserve to himself or to another person a power to revoke any or all of the uses declared in the deed and also to appoint other uses in their stead.

Failure of uses.

If a deed is made to uses to be afterwards declared, but for any reason they are never declared, or if a power of appointment is not exercised and no provision is made for such a contingency, or if uses are revoked and no others created in their place, or if in any manner a use fails, the law will not permit the party to whom the common law estate is conveyed to keep it himself because the uses have failed. There will be a resulting use to the grantor or his heirs to the extent of the failure of the intended uses. Thus if A gives land to B to the use of C or to uses to be afterwards appointed by C, and the use is for any reason void or C does not appoint, B will hold to the use of A or of his heirs if he is dead. Uses and powers of appointment can also be created and declared by will.

Uses by will.

Modern English deeds.

642. In England at present, by virtue of the various conveyancing acts passed in the reign of the late Queen, all real property lies in grant and may be conveyed by a simple deed of grant without livery of seizin. No particular words are essential, not even the word "heirs" to convey a fee or words of procreation for a fee tail. Short and simple forms of deeds have been provided by the statutes, which may be used at the option of parties, in which all superfluous parts are omitted and the cumbrous and verbose phraseology of the old deeds replaced by simple and direct statements. Generally deeds are not required to be recorded in any public office, and the ancient practice of handing over to a grantee all the former title deeds of his estate continues; that is, when a conveyance of land is made the grantee not only receives a deed of conveyance to him from his grantor, but also all the former deeds under which his grantor claims title, sometimes a large chestful. But provision has been made for having deeds recorded if the parties choose to do so.

Short forms.

Title deeds.

American deeds.

643. In the United States the statute of uses is regarded as a part of the law; in some of the states similar statutes have been enacted. Probably any of the old forms of conveyance may be used. Livery of seizin is obsolete. It has been held that the record of the deed which is required by statute is equivalent to livery of seizin, assuming that livery would still be necessary to a common law conveyance. Three forms of deeds are in general use.

Warranty deed.

A warranty deed is very nearly in the form of a common law feoffment or grant. The operative words are usually "give, grant, bargain and sell, convey and confirm," and a declaration of a use in favor of the grantee himself is commonly added to the *habendum*. The deed contains a covenant of warranty, whence its name, and generally other covenants. It has been decided that such a deed may be taken as amounting to a feoffment, gift, grant, lease, covenant to stand seized to uses or bargain and sale accordingly as may be necessary to give it effect.

Bargain and sale.

A deed of bargain and sale is like the preceding deed, except that the covenant of warranty, and often all covenants, are omitted.

Quitclaim deed.

A quitclaim deed, often called a release, is in form like a common law release. But it is also used as a primary conveyance, that is, it is not necessary that the party to whom the release is made should already have any estate or right in or to the property. Its effect is to pass whatever right or claim the grantor in fact has, and it is principally resorted to when the grantor does not wish to take the responsibility of warranting his title, in which case it is a substitute for a deed of bargain and sale, or to extinguish claims or doubtful rights.

Short forms.

In many of the states short forms of deeds have been provided by statute.

Recording of deeds.

Deeds of land must also be recorded in certain public offices designated by law. They are copied at length in books which are kept open for public inspection. An unrecorded deed is good against the grantor himself and all persons who claim as successors under him with notice of the deed or without having paid a valuable consideration. But as to any person who acquires rights in the land subsequent to the conveyance for valuable consideration

Effect of an unrecorded deed.

and in good faith without such notice, the unrecorded deed is void. Persons usually depend upon the record for evidence of their title, and on a conveyance the back deeds are not handed over to the grantee as in England.

Search of title

On a purchase of real property it is customary for the buyer to employ a lawyer to search the title, *i.e.* to examine title deeds or the public records so as to make sure that the seller really has the right which he assumes to sell. There is a large class of lawyers who make a specialty of this kind of work. Generally the searcher prepares what is called an abstract of title, which is a short written history of the title to the property mentioning all deeds, wills, judgments, descents and other acts and events affecting the ownership, and all easements, mortgages, liens, charges or burdens, if there are any, resting upon the property. In the large cities of the United States this class of law business has now fallen mostly into the hands of certain companies known as title assurance companies, who not only search the title but also insure it, *i.e.* contract with the buyer of the land that if the title turns out to be defective the company will indemnify him for any loss that may thereby be caused to him.

Abstract of title.

CHAPTER XLV.

SUCCESSION AT DEATH.

Testate and intestate succession.

644. Succession at death is either intestate, *ab intestato*, or it is testate, by will or testament. The rules as to succession, both testate and intestate, are somewhat different for real and personal property. We may begin with intestate succession to real property, which is called descent.

Descent.

645. When a tenant in fee dies his estate descends immediately to his heir. It is not at present necessary for the heir to enter or do any act to acquire the seizin. The name heir is not applied to a person so long as the ancestor from whom he expects to inherit is living. *Nemo est heres viventis.* Until the death of the ancestor he is heir apparent or heir presumptive, not *verus heres*. An heir apparent is one who will certainly be heir if he outlives the ancestor, whose chance of succession can not be cut off by the birth in the meantime of any other person. An heir presumptive is a person who would be heir if the ancestor should presently die, but it is possible so long as the ancestor lives that some one may be born who would be preferred to him in the succession. Thus at common law, if a man has sons, his eldest son is heir apparent, he must succeed if he lives long enough. But if there is no son, a daughter, or a brother if there is no daughter, may be heir presumptive, their expectations being liable to be frustrated by the birth of a son. In such a case even if the ancestor has died and the person who was heir presumptive has actually succeeded, the inheritance may yet be taken away by the birth of a posthumous son.

Heir.

Heir apparent.

Heir presumptive.

The stock of descent.

An estate can only descend from a person who had the estate, that is who was seized of it. The usual expression is that it goes to the heir of the person last seized. Therefore at common law if A died seized in fee leaving B as his heir, and B in turn died before he had got seizin by admission or entry, the estate would not descend to the heir of B, because he never

had it, but to the next heir of A, who was the person last seized. The same would be true now if the tenant should be ousted and die before regaining seizin; his heir would not inherit the estate. But the bare right of a person who is ousted will descend at his death to his heir in the same manner and subject to the same rules as an estate, and the heir may enter and regain the estate; and so will a possibility, *e.g.* the right to take advantage of a condition precedent. Estates in expectancy descend in the same manner as estates in possessions. The common law rule of descent are as follows.

Decent of bare rights, etc.

Rules of descent.

646. *Rule I.* Inheritances shall lineally descend to the issue of the person who last died actually seized *in infinitum*, but shall never lineally ascend. That is, if the decedent leaves any descendant, however remote, his heir must be found among his descendants. But even if he leaves no descendant, his father or mother or any lineal ascendant can never be his heir; the land shall sooner escheat. The rule excluding ascendants was of feudal origin and was introduced into England from abroad like many other feudal rules. It was doubtless based originally upon feudal reasons, the exact nature and force of which it may not be easy at present to appreciate. Blackstone thinks that originally all feuds granted to a man and his heirs could descend only to the heirs of his body and never to any collateral heirs, such as his brother or uncle, and that the rule that an inheritance could not lineally ascend was a survival of that ancient principle.[1] This however has been disputed by various other writers.

Lineal descendants.

Ascendants excluded.

647. *Rule II.* The male issue shall be admitted before the female. Thus if a man dies leaving several daughters and one son, the son, even though younger than his sisters, shall be sole heir and the daughters shall take nothing. This is known as the preference of males.

Preference of males.

Rule III. When there are two or more males in equal degree, the eldest only shall inherit, but females all together. This is the so-called rule of primogeniture. Thus if there are two sons and two daughters, the eldest son only will take the estate

Primogeniture.

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1 2 Black. Com. 212.

to the exclusion of his brother and sisters; but if there are daughters only and no sons, the daughters, whether by the same or different mothers, will all inherit as joint heirs or coparcenors.

Feudal rules.

The above mentioned rules of primogeniture and preference of males were plainly founded on the importance of having a tenant able to perform military services, and originated in the military fiefs, from which they were gradually extended to fiefs of all kinds. Even as late as the reign of Henry II socage lands often descended to all the sons. But by the time of Henry III the rule of primogeniture had come to be applied to them also, except in Kent where the old tenures in gavelkind survived, and in a few manors and towns where special customs of descent prevailed, such as borough English.

Descent of the crown and of dignities.

Primogeniture obtains even among females as to the succession to the crown. To dignities and titles of honor only one daughter can succeed; this however is not necessarily the eldest, but that one whom the king is pleased to designate.

Representation.

648. *Rule IV.* The lineal descendents *in infinitum* of any person deceased who would have been heir shall represent their ancestor. That is, they shall stand in his place and inherit as he would had he been living. Thus if a man has several sons and daughters, and the oldest son, who would have been heir if he had out-lived his father, dies in the father's life-time leaving a child, then that child, whether a son or daughter, shall be heir to the estate as the representative of his or her father, to the exclusion of his or her uncles and aunts, the other children of the decedent. If the eldest son at his death left several children, the rules of primogeniture and preference of males obtain among them. If one of them has died before the grandfather, leaving issue, his issue will in like manner represent him. So if a man has three daughters, A, B and C; and A and B have died before the father, A leaving sons and daughters and B leaving four daughters and no son, and one of B's daughters has also died leaving two daughters, then A's eldest son, B's surviving daughters and the daughters of her deceased daughter and C will inherit as coparcenors. A's eldest son will take one third, that being the share which would have gone to his mother had she lived, excluding his brothers and sisters.

The one third that would have descended to B will be divided into four parts, one to each of her three surviving daughters, who will therefore each receive one twelfth of the estate, and one to the two daughters of his deceased daughter, giving them each one twenty fourth. And C will take the remaining third of the estate.[2]

Succession *per stirpes* and *per capita.*

This mode of inheritance, where persons become heirs as representatives only and receive or may receive unequal portions, is called succession *in stirpes* or *per stirpes.* But where several persons inherit as joint heirs directly and not as representatives, they are said to succeed or to take *in* or *per capita,* and their shares are equal. Thus in the above example if the two daughters A and B were living at the time of their father's death, their children would not be heirs, but the three daughters, A, B and C, being the nearest lineal issue of the decedent, would be heirs directly and inherit *per capita,* each taking one third of the estate.

Summary of above rules.

The substance of the above rules is: that the eldest son, if living, shall be sole heir to his father; if he has died and left issue, his issue take his place as heirs in due order beginning with his eldest son; if he has left no issue, the second son of the decedent or his issue inherit; and after them the other sons or their issue in order of seniority; and lastly the daughters and their issue.

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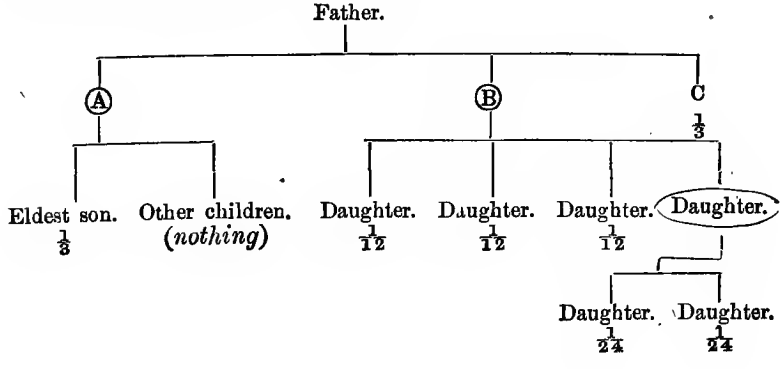
[2] The division of the property may be represented by the following diagram, in which a circle signifies that the person around whose name it is placed has predeceased the ancestor.



Collateral heirs.

649. *Rule V.* On failure of lineal descendants, the inheritance shall descend to the collateral relations of the person last seized, being of the blood of the first purchaser, subject to the three last preceding rules.

The first purchaser.

The first purchaser, who might perhaps with more propriety be called the last purchaser, is the person who last acquired the estate by purchase and so first brought it into the family. For so long as an estate passes by descent, since it can descend only to kindred, it remains in the same family; but by purchase it may pass into a new and different family. The object of this rule is to provide that in the descent of an estate it shall remain not only in the family of the person from whom it directly descends, but, if he himself acquired it by descent, in the family of the ancestor from whom it descended to him. If a man acquires an estate by purchase, then he is himself the first purchaser, and all his collateral relations, on his father's side or his mother's, are equally of his blood, and it may descend from him to any of them. But if he got it by inheritance from his father, then the first purchaser must have been either the father himself or some ancestor of the father, and relations on his mother's side are not of the blood or family of the first purchaser, and can not inherit. If the father was the purchaser, then all the relations on the father's side, including both the father's father's family and the father's mother's family, can be heirs. But if the father had himself inherited it from his father, then only relatives who are connected through the father's father are admitted to heirship, excluding not only the decedent's relatives through his mother but those through his father's mother. On the same principle if an inheritance comes from the maternal side, the relatives on the paternal side can not succeed to it.

Purchased estates.

Ancestral estates.

Preference of males, primogeniture and representation.

When an inheritance goes to collateral heirs, male heirs are preferred to females and older males to younger, and the issue of anyone who would have inherited if living may take in his stead as representatives, just as among descendants. For example, if the decedent left brothers and sisters, the eldest brother would be heir rather than the younger brothers or sisters. If the eldest brother were dead leaving issue, the issue would succeed in his place.

650. *Rule VI.* The collateral heir must be the nearest collateral kinsman of the whole blood. Kinship is reckoned for this purpose according to the rule of the common and canon laws. A person's nearest collateral relations are of course his brothers and sisters, if he has any. But since by Rule V the right of representation is admitted among collaterals, the representative of a nearer kinsman will be prefered to a kinsman who, though nearer than the representative himself, is more remote than the person whom the latter represents. Thus an uncle, being related in the second degree, is in fact nearer than a brother's grandchild, who is related in the third degree; nevertheless the brother's grandchild would be heir rather than the uncle, because he would come in as the representative of his grandfather, who was related in the first degree. The first part of the present rule therefore amounts to this: that on failure of issue of the decedent himself, the next in succession are the surviving issue of his father and mother, *i.e.* his brothers and sisters or their representatives; if there are none of these, then the surviving issue of his grandfather and grandmother, *i.e.* his uncle and aunts and their representatives, are next resorted to; if no heir can be found among them, then the inheritance goes to the issue of his great grandparents, *i.e.* his great uncles and aunts and their representatives; and so on, in each case exhausting the descendants of one generation of progenitors before going back to those of the preceding generation.

The next of kin.

Representation among collaterals.

Summary of above rule.

The second part of this rule excludes all kindred of the half blood.[3] Thus if a man had two children by different wives, though either child might be heir to their father, and if they were daughters both might inherit together from him as coparcenors, neither child or any of his descendants could succeed to the other or to any descendant of the other. This rule excluding the half blood seems to be peculiar to the common law and not to be necessitated by any requirement of the feudal system. Its actual origin and grounds are not known, and though many attempts have been made to find or invent good reasons for it, they have not been very successful.

Exclusion of the half blood.

[3] See § 216.

Preference of male stocks.

651. *Rule VII.* In collateral inheritance the male stock shall be preferred to the female, unless where the lands have in fact descended from a female. Thus if the decedent was himself the first purchaser, so that the estate might descend to his relatives on either his father's or his mother's side, still the father's side shall be preferred, and if any relative on that side can be found, no matter how remote, he will be heir in preference to any relative on the mother's side, no matter how near. For example, a second or third cousin of the father would inherit the estate rather than a brother of the mother.

Modern English law of descent.

652. The common law rules of descent have been greatly altered by statute in modern times.

The stock of descent.

In England the descent is not now traced from the person last seized but, subject to a few exceptions, from the person who last acquired the estate by purchase. Thus if A, the purchaser of land, dies and the land descends to his son B, and then B dies, the next heir of A, and not the heir of B, will succeed. This however, under the rule of representation will be B's son, if he has one. The object and effect of this rule is to keep land in the family of the purchaser. Ascendants may be heirs, and so may relatives of the half blood, but relatives of the whole blood are preferred to the half blood of equal degree.

Ascendants and the half blood admitted.

The American law of descent.

653. In the United States the statutes regulating descents are not quite the same in all the states; but in general they agree in the following points. Lineal ascendants are admitted to succeed after descendants, either in preference to all collaterals or concurrently with brothers and sisters and their issue. Primogeniture and preference of males and of male stocks are abolished. Males and females of the same class, *e.g.* all the sons and daughters or all the brothers and sisters, inherit together as coparceners, so that coparcenary is much more common in the United States than in England. Representation is not generally admitted among collaterals after the representatives of brothers and sisters. Thus if a brother or sister who would have been heir has died, his or her representatives may be substituted as at common law; but if there are several uncles and aunts and also cousins the children of deceased uncles and aunts, the uncles and aunts, being nearer in degree than the cousins, shall

Ascendants admitted.

No primogeniture or preference of males.

Representation restricted.

take the whole inheritance, and the cousins can not stand in the place of their deceased parents and take their share. It follows that all succession by collaterals after brothers and sisters and their representatives is *per capita* and not *per stirpes*. Thus if on a man's death his heirs are five nephews, two being the sons of a deceased brother and three of a deceased sister, the nephews will take by representation, *per stirpes*, so that the sons of the son will each receive one quarter of the estate and the sons of the daughter each one sixth. But if the heirs are five cousins, two of them children of a deceased uncle and three of an aunt, they will not take by representation but directly, *per capita*, each receiving one fifth. The half blood are in most places admitted to inherit.

The half blood admitted.

654. A will or testament is a juristic act by which a person makes a disposition of his property to take effect after his death. In strict technical language a will is a disposition of real property and a testament of personalty; but the two words are commonly used indiscriminately. The maker of a will is called the testator, while a person who dies without leaving a will is an intestate.

Wills.

A nuncupative will is one that is made orally. Such wills are generally invalid, but in some places they are allowed in special circumstances, for instance if made by mariners at sea or by soldiers in the field. Except in such cases a will must be in writing; if written entirely by the testator's own hand it is called a holograph. At common law a will need not be signed by the testator or witnessed; but now by statute the testator must sign the will, and in most places must subscribe it, that is, the signature is required to be at the end of the will. He must also publish it, that is, declare it to be his last will, in the presence of a certain number of witnesses, usually two or three, who must append their signatures as witnesses in his presence and in the presence of each other. In some places they must add their addresses.

Nuncupative wills.

Holograph wills.

Signature.

Publication and witnessing.

A codicil is an addition to a will, written either upon the will itself or upon a separate paper. It must be executed, published and attested by witnesses in the same manner as a will. If the will and a codicil, or if two codicils, conflict, the later in date prevails.

Codicils.

When a will takes effect.

A will is said to be ambulatory in its operation, that is, it has no effect at all so long as the testator lives, and he may alter or revoke it at his pleasure. Formerly a will of real

After acquired real property.

properly applied only to such property as the testator had at the time when it was made, not to what he afterwards acquired, unless after acquired property was expressly mentioned in it; but now by statute, a will speaks from the time of the testator's death, and covers all property then belonging to him, except so far as a contrary intention appears in the will itself.

Revocation of wills.

655. A will may be revoked by the testator by cancelling or destroying it with the intention of thereby revoking it. But an

Injury or destruction.

accidental destruction or injury does not affect its validity; nor does even an intentional erasure or alteration by the testator, provided

Alteration.

that he intends that the instrument shall still stand as his will, have the effect of a revocation, or indeed have any effect at all, but is simply disregarded; because any alteration of a will in order to be valid must be made with the same formalities as are required for the will itself. A will is also revoked by the

Subsequent will.

execution of a subsequent will by the testator. A later will, however, which invalidates all previous wills, must be distinguished from a subsequently executed codicil, which merely changes a former

Marriage of the testator.

will in certain particulars. The marriage of the testator after the making of the will followed by the birth of a child, or in most places at present the marriage alone, also renders the will void, unless a contrary intention is expressed in the will. The law presumes that a disposition of his property by an unmarried person would be very different from what he would desire to make if married, and that an omission to make another will after marriage was probably due to inadvertance.

Devises.

656. A gift of real property by will is called a devise and the person to whom it is given a devisee. A devisee takes

How devisee takes.

his estate *pro herede*, directly from the testator as his immediate successor, not indirectly through the personal representative; and, like the heir, he is now deemed to have seizin of the estate at once on the testator's death without having to make entry.

Legacies.

A gift of personal property by will is a bequest or legacy,

Pecuniary legacies.

and the beneficiary a legatee. A pecuniary legacy is a gift of money. Legacies are specific, general or demonstrative. A

specific legacy is a gift of something specifically designated in the will, such as a particular horse or watch, all the stock which the testator owns in a certain corporation or all the money which he has on deposit in a certain bank A general legacy is one whose subject is described *in genere* only, as being of a particular kind, for instance a gift of a sum of money simply, of a horse without specifying what horse, or of a certain sum in bank stock without reference to any specific stock. A demonstrative legacy is of a nature intermediate between the other two; the precise thing given is not specified, but it is to come out of a specified fund or from a specified source, as a gift of a sum of money out of the profits of a particular business enterprise or transaction or out of the proceeds of specific property which the will directs to be sold. If the subject of a specific legacy or the fund or property from which a demonstrative legacy is to be taken ceases to exist or to belong to the testator before his death, the legacy fails. A residuary devise or legacy is a general gift of all the real or personal property that is not otherwise disposed of by the will. A residuary gift is usually put in at the end of a will. Formerly if a devisee or legatee named in the will died before the testator and the will did not provide for such a contingency, the gift to him lapsed, that is, became void, and the property covered by it was disposed of as if there were no will, not even passing by a residuary gift but being excluded altogether from the operation of the will. But at present it is provided by statute that the gift shall not lapse in such a case but the property shall go to the representatives of the deceased donee or fall into the residuum.

Specific legacies.

General legacies.

Demonstrative legacies.

Lapse.

Residuary gifts.

Death of donee.

It is usual, but not necessary, for the will to appoint one or more persons to carry it into effect, who are called executors. A person named as executor may however renounce or refuse to accept the office.

Executors

657. A will of personal property has no validity, even after the testator's death, until it has been duly proved or probated in the court of probate. A will of real property takes effect as soon as the maker of it dies, without probate; but in most places probate of such a will is permitted

Probate.

for the sake of convenience and certainty, and in some places it is required.[4]

Propounding for probate.

It is the duty of the executor to propound or present the will for probate; but any person interested in the estate of the testator, *e.g.* a legatee or creditor, has the right to do so.

Contesting the will.

Any person whose interest would be affected by the will, for instance a person who would succeed *ab intestato* if there were no will, may oppose the probate on any ground that shows the will to be invalid. The court issues

Hearing and decree.

citations to all persons interested to attend the probate, and after hearing all parties who appear, makes a decree granting or refusing probate, that is, formally declaring the will to be

Probate in common form.

valid or invalid. If probate is not opposed, it is usually made in what is called common form, merely by the oath of the witnesses to the will that it was duly executed, or, if they can not be produced, by proof of the genuineness of their signatures; formerly, when no witnesses were required, by the

Probate in solemn form.

oath of the executor. But if any one appears and contests the will, probate in solemn form has to be made, that is, a regular trial is had before the court to determine whether or not the will is genuine and valid. After probate the original will is

Certificate of probate.

deposited in the court and a certified copy of it and of the decree of probate is given to the executor, which copy is itself called the probate.

Statute of wills.

658. After the Norman conquest real property could not be devised, except in a few places by special custom, until the statute of wills was passed in the reign of Henry VIII. But when uses were introduced land might be conveyed to uses to be thereafter appointed by will. Nor at common law

What personal property is testable.

could a man dispose of all of his personal property by will. If he left a wife and any child or children, the wife was entitled to one third of the property and the children or their representatives to one third, leaving only one third at the testator's disposal.

Reasonable parts.

If he left a wife only or a child or children only, the wife or the children or their representatives took one half. These portions

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[4] The reason for this distinction between wills of real and personal property is found in the history of the law of probate; see the following sections.

going by right to the wife or children were called their reasonable parts. At present however a person may dispose of all his property both real and personal by will, and may even give it to strangers to the exclusion of his own family, saving only the rights of husbands and wives to curtesy and dower in estates in fee

Disposition of personal property.

At common law, if there was no will, so much of the personal property of a deceased person as he might have disposed of by will did not go to his family but belonged to the King. Afterwards the Crown conferred the right to such property upon the bishop or ordinary, on the supposition that he would devote it to pious uses for the good of the intestate's soul. Probate of the will was originally merely for the purpose of showing that the ordinary had no right to the goods, and was therefore naturally made in the ecclesiastical court. But by the statute of Westminster 2nd the ordinary was compelled to pay the debts of the deceased out of the property received by him, just as an executor ought to do, and by a later statute he was directed to appoint an administrator to take charge and dispose of the property. The administrator was originally merely the officer or agent of the ordinary, and was therefore appointed in the ordinary's court.

Origin of probate.

Appointment of administrator.

Administration in modern law.

659. At present when a person dies intestate as to the whole or any part of his personal property, it is necessary to appoint an administrator or administrators. Any one interested in the estate may apply to have the appointment made. Notice of the application is given to all persons concerned, and the court appoints one or more persons as administrators after hearing all parties who appear. The persons to whom administration may or must be granted are designated by statute. Generally it should be committed to the husband or wife or next of kin of the deceased, if they are properly qualified persons and will accept it. If not, some creditor should be appointed; and if no proper person can be found among the creditors, the court may appoint any person. In some of the United States there is an officer known as a public administrator, who must be appointed in preference to remote kin or creditors. If there is a will but no executor is named in it,

Who may be administrator.

Public administrator.

or if the executor is dead or renounces, an administrator *cum testamento annexo* is appointed. A residuary legatee may be selected for this post instead of the next of kin. If the executor named is under the age when the law permits him to act, which age differs in different places, being usually from seventeen to twenty one, or is out of the jurisdiction when the testator dies, or if any delay occurs in proving the will, the court may appoint a temporary administrator to take care of the property. When an executor or administrator dies or is removed, he is replaced by an administrator *de bonis non administratis*, usually called simply an administrator *de bonis non*. An administrator, and sometimes but not usually an executor, is required to give security for the faithful performance of his duties. This is called qualifying. The reason for not requiring an executor to qualify is that he has been selected by the testator himself as a fit person to be trusted. After an administrator has qualified letters of administration are issued to him by the court as evidence of his appointment and authority.

Administrator with will annexed.

Temporary administrator.

Administrator *de bonis non.*

Qualifying.

Letters of administration.

Personal representatives.

660. Executors and administrators are called the personal representatives of the decedent. The heir is called the real representative. The rights of an executor are not derived from the probate but directly from the will, the probate being only evidence of his rights. He may therefore do various acts as executor before probate, though he can not maintain any action in that capacity until by means of the probate he is able to produce record evidence of his authority. If however probate of the will is refused, his acts as executor become invalid *ab initio*. An administrator has no authority until he receives his letters of administration, but then his rights relate back to the time of his intestate's death, so that he can sue for any injury done to the assets before his appointment.

Executor *de son tort.*

Any person who wrongfully meddles with the property of a deceased person is called an executor *de son tort*. He is subject, as to all the property which has come into his hands, to all the duties and liabilities of an executor, but has none of the latter's rights. He is liable to be sued for the debts of the deceased, but may not apply any of the property of which he

gets possession to pay a debt due to himself, as an executor may. He must account for all such property both to creditors and to the lawful representative of the deceased, but will be allowed for expenses incurred by him in the care of the property and for payments made by him to creditors, if such expenses and payments would have been proper had he really been executor, except so far as the lawful representative is thereby prevented from getting payment for his own debt. But mere acts of humanity or necessity will not make a person an executor *de son tort*, *e.g.* locking up the goods of the deceased to preserve them from loss or injury.

Personal property does not descend.

661. Personal property as a general rule does not descend to the heir; but there are a few exceptions. An annuity, though generally personal property, may be granted to a man and his heirs, and then will be heritable. Therefore annuities are included among incorporeal hereditaments. The title deeds of land also and the chests in which they are kept, which are chattels, in England descend and pass by other kinds of transfer with the estate to which they relate as a kind of legal accessory. There are also in England certain chattels which, though not in the ordinary sense accessory to the land, and therefore to be distinguished from fixtures, nevertheless by custom go with the land to the heir. These are called heir-looms.[5] They are mostly old pieces of furniture and the like in mansions. Blackstone mentions also pews in a church, monuments, tablets, armor and similar things placed or hung up in churches, deer in an authorized park, doves in a dove house and fish in a pond.

Annuities.

Titls deeds.

Heir-looms.

Personal property goes to the personal representatives.

Subject to the above exceptions, personal property on the death of the owner passes in the first instance to his personal representative, who becomes not merely the manager but the owner of it.

The personal representative is a universal successor.

662. The personal representative is a universal successor to the decedent as to personal property and all obligations that are not extinguished by the latter's death, but has nothing to

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[5] The word "loom" here means a limb or member, *i.e.* of the inheritance.

Double capacity of the personal representative.

do with the real property. He is regarded as continuing the legal existence of the decedent, and therefore as being in his representative capacity the same person as the decedent and a different person from himself in his individual capacity; though this principle has not been in all cases carried out to its logical results. He is not responsible for any debts or claims against the decedent except so far as he can pay those out of the property of the latter which he receives as representative, which is called assets;[6] nor are those assets in any way liable for or capable of being taken or applied in payment of his individual debts. His own property and rights and those of the deceased person whom he represents are kept carefully apart. Any acts which he may do or admissions which he may make in his individual capacity are not binding upon him in his character as representative, nor any thing that he may do in the latter character upon him individually. On the other hand he is bound as representative by the acts and admissions of the decedent, because in that capacity he is legally the same person as the latter and the acts are therefore his own acts.

Expenses of administration.

If expenses are incurred by the personal representative in the course of the administration, he is allowed to repay himself for them out of the estate or assets. Those expenses form a first charge or claim on the assets, and must be paid in preference to claims of creditors. But they must be proper in character and reasonable in amount. Any excess beyond what is proper and reasonable must be borne by the representative himself. He has no authority by any contract or act of his to bind the estate directly; that is, the assets can not be seized to satisfy a claim arising out of any act done by him in the course of the administration. The estate itself is not a juridical person. As to third persons he is individually liable for his contracts or acts; for example, if he should contract for repairs to be made on the property or if he should wrongfully take property of a third person supposing it to belong

Authority and responsibility of personal representative.

[6] The word assets denotes property considered as a fund for paying debts or claims. It is derived from the French *ase.* or *asses*, Latin *ad* and *satis*, meaning enough.

to the estate, he would be responsible exactly as if he was not executor or administrator. But if by such means he incurs any liability properly and reasonably on behalf of the estate, he may charge that as one of the expenses of the administration.

Burial of the deceased.

663. The first duty of the representative is to see the deceased person buried in a manner suitable to his station in life, and the charges of doing so are a part of the expenses of administration. The representative must then proceed to administer or settle the estate. The first step is to make an inventory of the assets setting down each article and its value. By the common law no inventory need be made unless that was ordered by the ecclesiastical court, which however would usually make an order to that effect at the request of any person interested in the estate. But the general rule in the United States is that a sworn inventory must be filed in the court of probate as a matter of course, and the court usually appoints commissioners to assist in making it and to appraise the value of the property.

Settlement of the estate.

Inventory.

Assets for which the personal representative is responsible.

The assets as stated in the inventory are what the personal representative is *prima facie* responsible for; but he or any party interested may show that the inventory was wrong, *e.g.* that property not really belonging to the deceased was improperly included in it or property omitted which should have been included, or that the value of the assets was under or over estimated in it, or that portions of the assets have been lost or destroyed without his fault, and so lessen or enlarge his responsibility.

He must take care of the assets.

He must use ordinary care for the safe keeping and management of the assets. If they are lost, injured or deteriorated by his negligence or wilful misconduct, or if he misappropriates them, either by converting them to his own use or by making, even by mistake or in good faith, improper payments or deliveries to third persons out of them, he is said to be guilty of a *devastavit*, and he and his bondsmen must make good the loss. But he is not responsible for a loss or deterioration of the assets happening without his fault.

Devastavit.

Collection of assets.

It is his duty to collect and get possession of all the assets and put them into shape for distribution. For this purpose he may bring any action or use any remedy that would have been open to the decedent himself. If he wilfully neglects to collect or take possession of any assets which he might have got in, he is chargeable with their value as if he had received them; but not if his failure to collect is without his fault, *e.g.* if he did not know of their existence or if a debt should turn out to be uncollectible. If it be necessary, as it usually is, to turn any part of the assets into money, he has authority to sell so much as is needful. He ought regularly to sell at auction, otherwise, if the price received by him is less than the actual value of the goods, he will be himself liable for the difference.

Sale of assets.

Debts due from the personal representative.

If the personal representative is himself indebted to the estate, he is responsible to the creditors of the deceased person for the amount of the debt as if it were assets in his hands, that is, as if he as personal representative had received the amount from himself in his individual capacity. But as to legatees and next of kin there is a difference in this respect between executors and administrators. If a person makes his debtor his executor, that is considered a release of the debt, and although that release, being merely voluntary and without consideration, is invalid against creditors, it is valid against legatees who take from the decedent by way of gift merely. But in case of an administrator the right of action on the debt was formerly destroyed, but not the debt itself; and if he died an administrator *de bonis non* appointed in his place might sue his representative for the debt; and under the modern law he must account for it as assets.

Payment of debts.

664. The next duty of the personal representative is to pay the debts of the deceased.[7] If there are sufficient assets, he must pay all the debts in full. But if there are not, if, that is, the estate is insolvent, the law has established a certain order of priority among the debts, and all debts of a higher order or class must be paid in full before anything is paid on

Priority among debts.

[7] The word debts includes here all claims against the decedent which have not been extinguished by his death, whether technically debts or not.

those of a lower order. If the personal representative improperly pays the latter first, so that the preferred creditors are unable to get their pay, he is guilty of a *devastavit*, and is personally responsible to the preferred creditors. The order of preference among debts is different in different places and has been changed from time to time. Generally debts due to the government, for instance unpaid taxes, are entitled to preference, and in most places wages due servants are also preferred, on the ground of the hardship to such poor people of losing their dues. Judgment debts and all specialty debts were formerly payable before simple contract debts, and in some places still are; but in most places this rule has been abolished. Among debts of the same rank the old rule was that the personal representative might pay them in any order he pleased, and if there were not assets enough to pay them all, he might pay some of them in full and leave the others unpaid. If he was himself a creditor, he was entitled, since he could not sue for his debt, to retain sufficient of the assets to pay his own claim in preference to those of other creditors of equal rank. But an executor *de son tort* had no such right of retainer. If a creditor has any security for his claim, he may enforce his security and so obtain payment without regard to the rank of his debt. Thus if a creditor holds the promissory note of the decedent, which is a simple contract debt, and has a mortgage on the decedent's personal property to secure it, he may foreclose his mortgage and thus get his money, or the personal representative may pay the mortgage and redeem the property, although the assets are thereby so much diminished that other creditors, even of superior rank, have to go unpaid.

Payment of debts of equal rank.

Retainer.

Secured creditors.

665. A creditor of the decedent has no specific claim or lien on the assets for his debt, but only a personal claim against the executor or administrator, on which he may sue the latter just as he might have sued the decedent himself in his lifetime. The personal representative therefore may be exposed to two classes of actions, namely: (1) actions on contracts made or acts done by him in the course of the administration, as mentioned in § 662, where the cause of action never existed against the decedent at all, and (2) actions on claims that existed against the decedent in his lifetime. In either kind of action, since the estate

Creditors have no lien.

Actions against the personal representative.

is not a juridical person, the action is against the personal representative; and in either a judgment rendered against him binds him personally and may be enforced against his private property.[8] But in actions of the latter sort the personal representative may defend himself, not only by contesting the creditor's claim, but by a plea that he never has had any assets of the deceased in his hands out of which he could have satisfied the claim, or that he has already fully administered (*plene administravit*) all the assets which have come to his hands so that he has no assets left available for the payment. On such a plea being set up the court will inquire what assets the representative has received or ought to have received, and whether, after making proper allowance for the expenses of the administration and for the payment of preferred claims, he has or ought to have sufficient assets left in his possession to pay the claim in suit. For this purpose the court may take an account of the administration so far as it has gone. If no assets are found, judgment goes against the creditor, even though his claim is in itself a just one, because, whether just or not, it is impossible that it should be paid. But if sufficient assets appear, an absolute judgment is rendered in the creditor's favor for his debt or for such part of it as the assets are sufficient to pay. This amounts to an appropriation of so much of the assets to the payment of that specific claim, so that if another creditor afterwards sues for his debt, the personal representative on a plea of *plene administravit* may deduct the amount of the former judgment, even though he had not yet paid it, from the assets in his hands, as being already disposed of and accounted for. The effect is that a creditor who gets a judgment for his debt obtains a priority over other creditors of the same class who do not sue, if the assets are insufficient to pay them all, and that judgments obtained by different creditors must be

Plea of no assets or *plene administravit*

Account.

Judgment in a creditor's action.

[8] In the latter class of actions this is illogical, since the representative is liable for the debts of the deceased only in his representative capacity. But it is prevented from working practical injustice by the plea of no assets or *plene administravit* presently to be mentioned.

paid in the order of their rendition. Whenever therefore there is any doubt about the solvency of the estate it is for the interest of a creditor to begin suit at once even though his debt is not disputed.

Real property not assets.

666. Real property is not assets in the hands of the personal representative for the payment of debts. Specialty debts may be made binding upon the heir, so as to impose upon him a personal obligation to pay them to the extent of the assets which he receives by descent, but there is no lien upon the land. Thus there was no way at common law by which the land of a deceased person could be made available for the satisfaction of his simple contract creditors. In most of the United States, however, it is provided by statute that, if the personal property is insufficient to pay the debts, some proper court, usually the court of probate, on the application of the personal representative shall take the real property, or so much of it as is necessary, from the heir or devisee or any one to whom he may have conveyed it, sell it, and turn the proceeds over to the personal representative for the payment of debts. This in effect gives a lien upon the land for the debts in the nature of a hypothecation.

Specialty debts binding upon the heir.

Sale of real property to pay debts in United States.

Distribution of the surplus.

667. After the debts are paid, if there is a will, the remainder of the estate should be distributed according to the provisions of the will. Legacies given in a will are to be paid in the following order. First, specific and demonstrative legacies; secondly, general legacies. If there are not assets enough to pay the latter in full, they ought all to abate *pro rata*, without preference being shown to one over another, unless the will directs otherwise; but there seems to be no way at law to compel the executor to pay them so. Lastly, what is left goes to the residuary legatee, if any. If there is no residuary gift, the old rule was that the residuum belonged to the executors. But this rule is now abolished, and the remaining property is disposed of as if there had been no will. If in the course of administration it becomes necessary to sell any portion of the assets to raise money, the things which form the subjects of specific and demonstrative legacies should not be sold till after that portion of the

Order of payment of legacies.

Undisposed of surplus.

Order of application of assets.

assets not specifically disposed of; that is, debts should be paid at the expense of the general rather than the specific and demonstrative legacies. The widow's paraphernalia consist of jewels and ornaments worn by the wife of the deceased during his life but which belonged to the husband. These may be sold to pay his debts if necessary, but only as a last resort, after all the other assets have been exhausted. Of course the wife's own property can not in any case be taken for her husband's debts.

The widow's paraphernalia.

Statutes of distribution.

668. If there is no will or if the whole of the property is not disposed of by will, so much as remains undisposed of after settling the estate goes by virtue of the statutes of distribution to the next of kin of the decedent. If there is a surviving husband[9] or wife and also any child or children or other descendants, the property is divided among them, a husband usually getting one half or a wife one third, the rest going to the children, and the children and their representatives taking their shares *per stirpes*; though in some places the ancient rule is still in force that a husband who is administrator to his wife is entitled to the whole property after the payments of debts. If there are children or descendants only, they take the whole. There is no preference of males or primogeniture. If there is no husband, wife or descendant or if they do not take the whole property, the residue of the property is given to the nearest relatives of the deceased reckoned according to the rule of the civil law, admitting ascendants and kindred of the half blood, and without primogeniture or preference of males, so that all relations of the same degree are treated alike. There is generally no representation allowed after the representatives of brothers and sisters, remote collateral kin taking *per capita*. In the United States the next of kin are usually the same persons as the heirs, and in England the heir is usually found among them.

Next of kin.

How legatees and distributees take.

669. Legatees or next of kin, therefore, do not take as direct successors of the deceased person, but directly from the personal representative in whom the property vests in the first place.

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[9] Strictly the husband or wife is not included among the next of kin; but for brevity's sake the term next of kin is often used to include all persons who take personal property *ab intestato*.

No actions for legacies, etc.

No action at law lies in favor of a legatee against the executor for a general legacy or by a distributee against the administrator or his distributive share. The reason is that the personal representative is not bound to pay unless he has sufficient assets, and a court of law, having no machinery for taking a general account among all the claimants, can not know whether he has assets or not. But the possession of assets is a sufficient consideration for a promise by him to pay, so that an action will lie on such a promise; and an assent by him to the legacy or the claim is an admission that he has assets, on which the law will raise an implied contract to pay.[10]

Promise by the representative to pay.

The common law scheme of administration.

670. The foregoing is the scheme for the disposal of a decedent's personal property of the ecclesiastical and common law somewhat modified by statutes.

Restrictions on the ecclesiastical courts.

But the jealousy of the courts of common law, which were always desirous to restrict the jurisdiction of the civil law courts, prevented the ecclesiastical courts from exercising any effectual control over the administration. For instance, when the ecclesiastical courts endeavored to secure a proper distribution of the assets among the next of kin by compelling the administrator to give bonds for a distribution, the common law courts declared the bonds void. In fact the power of the ecclesiastical courts was limited to proving the will, granting letters of administration and requiring an inventory to be filed. Nor could the courts of common law themselves supervise the administration. Their forms of procedure, as will be explained in a future chapter, became fixed and rigid at a very early date, and they had no procedure adapted to the management of estates.

Incompetency of the common law courts.

Defects of the common law scheme.

The defects of the legal scheme of administration arise principally from two causes. (1) The courts of law have no form of action to which all persons interested can be made parties, the judgment in which shall determine the rights of all. Therefore there is no way of getting a general account of the administration binding on all. The account taken on a plea of *plene administravit* is binding only on the parties to that suit. Hence no *pro rata* payments or payments to a

No general action or general account.

No *pro rata* payments.

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10 See § 762, 927.

class of persons, whose amounts could only be ascertained by a general account, can be ordered, either of debts or of legacies or distributive shares. (2) There is no way of making real property available for the payment of debts. It is true speciality creditors generally have a right to resort to the heir. But they need not do so; and so it may happen that those creditors may exhaust the personal assets and leave not enough to pay the simple contract creditors, when if they could have been in any way compelled to take their debts out of the real property there would have been enough to pay all the debts. The same may happen if particular creditors have mortgages or other liens on the assets.

No resort to real property.

Improper application of assets.

Points to be provided for.

The following principal points therefore had to be provided for. (1) To compel the executor or administrator to give security for the faithful performance of his trust and to render a proper account. (2) To see that debts of equal degree were paid proportionally when there were not assets enough to pay them in full. (3) To see that the different portions of the assets were applied in the most advantageous way to pay debts. (4) To enable legatees and next of kin to enforce their rights against the personal representative. (5) To find some way to make real property available for the payment of debts.

Administration in equity.

671. When the jurisdiction of the courts of equity became well established, those courts were found competent to deal with just those matters which the common law courts could not and the ecclesiastical courts were not permitted to manage. The equity courts were not hampered by any forms, and could entertain suits not merely between two parties for one of whom judgment must be given against the other unqualifiedly, but practically between any number of parties, each of whose rights and duties could be separately declared and adjusted. Thus the taking of accounts between parties became one of the common heads of equity jurisdiction. Also by means of their doctrine of trusts, by treating the personal representative as a trustee for all parties interested, the courts of equity were able to arrange and distribute the assets in a just and advantageous manner, to compel the payment of legacies and distributive shares,

and in many cases by means of equitable liens to make real property available as assets.

Generally no resort to equity.

Ordinarily, however, there is no need to resort to equity or for the court to supervise the administration in any way. If the estate is solvent, it makes no difference in what order the debts are paid, since they are all fully paid in the end; and if the personal assets are sufficient, there is no necessity for calling upon the land. And generally executors and administrators in fact act uprightly and respect the rights of legatees and distributees. When therefore the will has once been proved or administration granted, the personal representative usually goes on and settles the estate without any occasion for applying to a court of equity. But if the estate is insolvent or if any dispute or difficulty arises, any party interested, the personal representative himself, a legatee or one of the next of kin or a creditor, may bring the matter into equity by means of what is called an administration suit, to which all persons interested should be made parties; and the court thereupon assumes the superintendence of the entire administration, and administers the estate on equitable principles, treating the personal representative as its agent for that purpose. If the representative has not already filed an inventory, he is now compelled to file one in the court of equity; and at the end of the administration he must render to that court a full and correct account of the assets received and disposed of by him and of his whole doings as executor or administrator, which must be sworn to by him, and as to the correctness of which the court will make a rigid inquiry if any interested party offers objections to it or any part of it. Sometimes when the administration lasts for a long time the personal representative is required to make provisional accounts from time to time.

Administration suits.

Inventory.

Account.

Equitable administration in the United States.

In England an administration suit is brought in a court of equity. But in the United States the courts of probate usually have the powers of courts of equity in all matters relating to administration, and exercise without any formal administration suit being instituted, on motion or petition by any person interested, all necessary supervision and control over the administration, so that a suit in

equity is rarely necessary. But the rules and principles that the American probate courts apply are the same in the main as those applied by the English courts of equity, where they originated, though many of them have been embodied in statutes, and some of the English rules have been rendered inapplicable by statutory alterations of the law. An inventory and a final account are required as a matter of course in all administrations, it being the official duty of the court to see that they are filed whether asked for by any party or not.

Equitable assets.

Land charged with debts.

Constructive charge.

Land devised to pay debts.

672. Equity treats as assets and brings into the administration some property which is not so treated at law. A testator may by his will charge his real property with the payment of his debts. Such a charge does not make the land the property of the personal representative, but creates an equitable lien or hypothecation upon it in his favor, which the court, if necessary, will enforce by a judicial sale, and will hand over the proceeds of the sale to him. Such a charge is now unnecessary in most of the United States, because of the statutory provision, already mentioned, by which the court can order a sale of real property to raise money to pay debts; and at present in England by statute land belonging to a decedent which is not disposed of by his will but permitted to descend to his heir is treated as if charged with debts. Sometimes however a testator, instead of merely charging his land with his debts, devises the land to his executors or to trustees in trust to pay them. This creates an ordinary trust, which will be enforced in equity like any other trust.

Property appointed to a volunteer.

A person who has a general power of appointment over property may usually appoint to his own use or to that of his personal representatives. If therefore he appoints to some one else without any consideration, and does not leave assets enough to pay his debts, equity, applying the general rule that a gift of property by a debtor is invalid against his creditors, will treat the appointee as a trustee for the personal representative, and will compel him to turn over the property to the latter to be used in paying debts if necessary.

Real property charged with the payment of debts and property over which the decedent has exercised a general power of appointment in favor of a volunteer, that is, of a person who has paid no consideration for it, as well as certain equitable property belonging to married women which will be treated of in another place, are called equitable assets.

Equitable property of married women.

In distributing equitable assets among the creditors when the estate is insolvent equity disregards certain of the distinctions between different classes of debts which are or were observed at law. This it does on the ground that at law the creditors could not get at such assets at all, and if they seek the aid of equity they must be content to receive such aid as is consonant to equitable principles, one of the chief of which is that equality is equity. Thus it does not allow any preference to specialty creditors over simple contract creditors or to creditors who have judgments. Indeed it goes farther than this; if out of the legal or ordinary assets partial payments have been made to those classes of preferred creditors, it will direct that an equivalent amount be paid to the non-preferred creditors out of the equitable assets, so as to put them on an equality with the others, before any farther payment is made to the latter. This doctrine is now of less importance, because the equitable rule of distribution has lately been adopted by statute in England and in many of the United States for all assets both legal and equitable.

Payments to creditors out of equitable assets.

673. Equity also, when there are not enough assets to pay any class of creditors in full, will not permit the executor or administrator to favor one over another, but compels him to treat them all alike and pay them *pro rata* so far as the assets will go. Accordingly if a creditor sues the personal representative and gets a judgment for his debt, he does not thereby acquire any advantage over other creditors. The judgment determines the validity and amount of his claim, but he is not allowed to enforce it for more than his proportional share. It is to be paid only in the course of administration like other claims. The same principle is applied to the personal representative's right of retainer for his own debt;

Payment of debts in equity.

Actions by creditors.

Retainer.

he can only retain so much of it as is in proportion to what is paid to other creditors of the same class.

Time for presenting claims.

A time is fixed by the court within which creditors are to present their claims to the personal representative; and until that time has expired he ought not to pay any claims. If he does so, he does it at his own risk. After the expiration of the time, when all the creditor's claims have come in, it is possible to see how far the assets will go in paying the debts, and they are ordered to be paid accordingly. Sometimes partial payments are made from time to time as the personal representative succeeds in getting in the assets. If any creditor presents his claim after the time limited, he is still entitled to be paid if the personal representative happens to have left in his hands any assets available for that purpose, but not otherwise.

Application of assets to pay debts.

674. When it is necessary to use a part only of the assets for the payment of debts, it is evidently a matter of importance to the legatees and next of kin, and whenever real property can in any way be got at also to the heirs and devisees, which of the assets are to be so used. It is for the interest of the heir, for example, that all debts be paid out of personalty, but of legatees or next of kin that the real property be resorted to. The arrangement of assets in a certain order for the payment of claims, and directing claims to be paid out of one fund before resorting to a different fund, is known as the marshaling of assets. It is of frequent occurrence in equity, not only in the administration of the estates of deceased persons but in cases of bankruptcy, of settling up the affairs of partnerships and companies, and generally where various persons have mortgages, liens or claims covering in part the same property. Equity in such circumstances will usually on the application of any party in interest marshal the assets so as to apply them in the most advantageous manner.

Marshaling of assets.

The equitable order of application.

Equity has established an order for the application of assets in the payment of debts. This is based on the expressed or presumed intention of the decedent himself, and follows two general principles, namely, that property which the deceased has not specifically disposed of otherwise should be used for paying his debts before property

which he has so disposed of, and that personal property should be used rather than real property. The primary fund for the payment of debts is what is called the general personalty, which consists of such personal property as the deceased has not specifically bequeathed by his will; if there is no will, it includes all of the personal property. All debts should be paid out of that so far as it will go. If that is not sufficient, then if the deceased has by his will devised real property to his executors for the purpose of having it used to pay his debts, and not merely charged it with the payment, such real property should next be taken. After that, real property which has descended to the heir, *i.e.* as to which the decedent has expressed no intention, is to be resorted to, and then land devised but charged with the payment of debts, *i.e.* as to which the testator has expressed an intent that it shall go to the devisees but that it may be used to pay debts if necessary. The above includes all the property as to which the testator has expressed no intention or has indicated a willingness that it may be applied in payment of debts. If that is not sufficient, it becomes necessary to take for that purpose the property which the testator has devoted to other uses. Personal property forming the subject matter of specific or demonstrative legacies should next be sold to raise the money necessary, and after that, in the United States, land disposed of by will and not charged with debts. Then comes property appointed to volunteers under a power, and as a last resort the widow's paraphernalia.

The general personalty.

Other assets.

675. But although the above is the order of application of assets which equity considers proper, the court can not directly prevent creditors from enforcing their legal rights. It may happen therefore that a creditor in fact takes his pay out of a fund which under the equitable rule ought not to have been used for the payment of his debt. In that case the person who would have been entitled to that fund has a right in equity to stand in the place of the creditor and enforce for his own reimbursement any claim which the creditor would have had against some other fund from which payment ought to have been made. This is called subrogation. In various cases of the marshaling of assets subrogation may occur.

Interruptions of the equitable order.

Subrogation.

For instance when the general personalty is sufficient to pay all the debts, so that no other portion of the assets ought to be used for that purpose, it may happen that a specialty creditor will sue the heir at law and force him to pay or a secured creditor will enforce his lien on a chattel specifically bequeathed. Equity can not prevent his doing so; but in such a case the heir or the specific legatee will be subrogated into the place of the creditor, and will have a claim to be reimbursed out of the general personalty. Or the personal representative may, without waiting for the creditor to act, at once pay him off out of the general personalty and so free the realty or specific legacy from his claim. When

Exoneration. a claim or charge is in any manner taken off from one fund and put upon another, the former fund is said to be exonerated. Exoneration is a common incident of the marshaling of assets.

Locke King's act. But in England by Locke King's act[11] it is provided that land descended or devised shall not be exonerated from a mortgage or lien upon it, unless the decedent has expressed an intention to have that done. Therefore if a mortgagee obtains his pay out of the personalty, the personal representative is subrogated into the mortgage and may foreclose it against the heir

Exoneration by will. or devisee. A testator may by his will exonerate any portion of his property and direct out of what part of it debts shall be paid, or may establish such order of application as he pleases.

676. Having seen to the payment of creditors, and as-

Account. certained by means of a proper accounting what assets remain in the hands of the executor or administrator for distribution, the

Distribution. court of equity will direct him to distribute it to the legatees or next of kin according to their rights, whether he has assented to their claims or not.

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[11] 17 and 18 Vict. c. 113.

CHAPTER XLVI.

BANKRUPTCY AND ASSIGNMENTS FOR CREDITORS.

Insolvency and bankruptcy.

677. A person who can not pay his debts is said to be insolvent. Insolvency is a condition of fact. A bankrupt is one who has been declared to be such by a decree of a court and his property taken from him to be administered for the benefit of his creditors under the supervision of the court.

National and state law in the United States.

By the constitution of the United States bankruptcy is one of the subjects that fall under the jurisdiction of the national government. The bankruptcy acts are national statutes, and bankruptcy proceedings are in the United States District Courts. But some of the states have laws for the administration of the property of insolvent debtors for the benefit of their creditors, under which a kind of bankruptcy may take place. These are generally known as insolvent laws, to distinguish them from the national bankruptcy laws, and proceedings under them as proceedings in insolvency. The same general principles apply to such proceedings as to proceedings in bankruptcy, but with some differences in details. If proceedings are begun under a state law, they are superseded by the subsequent commencement of bankruptcy proceedings under a national law, the authority of the national government being paramount. There have been several national bankruptcy acts.

Insolvent laws.

Bankruptcy acts.

Preferences among creditors.

A person who is insolvent and unable to pay his creditors in full has a right to prefer one to another, paying a favored creditor his entire claim and letting others go unpaid. Also a creditor who sues for his debt, gets judgment and seizes the debtor's property on execution obtains an advantage over other creditors, so that as soon as a man is insolvent or suspected to be so every creditor has a strong motive for suing him. There-

Judgment creditors.

fore it often happens that the property of an insolvent is very unfairly distributed among his creditors or is wasted by the expenses of law suits, or even that a person who is not really insolvent but would have paid all his debts had he been let alone is driven into insolvency and ruin by importunate creditors. To prevent those evils and secure justice among all creditors is the aim of the bankrupt law. The law of bankruptcy is wholly statutory. The first acts were passed for the benefit of the mercantile community, and under them only traders could be made bankrupts; but now any one may be.

The bankruptcy law is statutory.

Voluntary Bankruptcy.

678. Bankruptcy is voluntary or involuntary. The former is where a person is declared a bankrupt at his own request. If a person finds himself insolvent or embarrassed, and wishes to protect himself against suits by his creditors or secure an equitable division of his property among them, he may present a petition to the court of bankruptcy praying to be declared a bankrupt.

Involuntary bankrupcy.

679. Involuntary bankruptcy is where a creditor or creditors present the petition. The debtor is entitled to notice of the petition and an opportunity to oppose it, and an adjudication can not be made against him unless he is proved to have committed an act of bankruptcy. What is an act of bankruptcy is defined by statute. In general it is one which shows that the party is insolvent or that he is attempting to defraud his creditors or prevent or hinder them from getting their dues, such as not paying his mercantile debts or judgments obtained against him within a certain time after they are due, giving notice of a suspension of payments, conveying away, disposing of or concealing his property to prevent his creditors from seizing it or in other ways manifesting such an intent, or absconding to avoid his creditors. In a voluntary bankruptcy the filing of the petition by the insolvent is an act of bankruptcy.

Act of bankruptcy.

Assignees in bankruptcy.

680. If the debtor is adjudged a bankrupt, one or more assignees or trustees are appointed by the court or by the creditors of the bankrupt at a meeting of creditors called for that purpose, to whom all the property of the bankrupt both real and personal, except such property as would be exempt from seizure on execution, is transferred either by the mere decree of the court or by a deed executed by some officer of the court

under its orders. The assignee must give bonds for the faithful execution of his trust. His powers and duties are substantially the same as those of the administrator of a deceased person. Powers and duties of assignees.

681. Pending the proceedings in bankruptcy all suits against the bankrupt by his creditors in other courts are stayed, all property of his which has been attached in such suits is released, and transfers of his property or payments of money made by him within a certain time before the commencement of the proceedings, except to purchasers or payees in good faith and for valuable consideration, are avoided, so that no creditor shall be able to obtain an unjust preference. A time is fixed within which creditors must present their claims and make oath to their correctness, and notice of this is given to the creditors. If any creditor's claim is disputed by the assignee or by any other creditor, its validity is decided either by the bankruptcy court itself or in an ordinary action brought for that purpose by the creditor, with the permission of the court of bankruptcy, against the assignee in some competent court. Such creditors as duly prove their claims become parties to the bankruptcy proceedings. Immediately after the adjudication of bankruptcy a meeting of the creditors is called for the election of an assignee; and other meetings are held from time to time during the pendency of the proceedings, to which the assignee makes reports of his doings. Stay of suits. Dissolution of liens; avoidance of transfers. Proof of claims. Meetings of creditors.

The course of the administration of a bankrupt's estate is very nearly the same as that of a deceased person's in equity, and the courts of bankruptcy have so far as necessary for the purposes of the administration the powers of courts of equity. The assignee must make an inventory of the assets and file it in the court. He must collect the assets and turn them into money, and pay the creditors' claims according to the order of preference established by statute, which is usually substantially the same as among claims against the estate of a decedent. If there are not assets enough to pay any class of claims in full, he must pay them as far as he can *pro rata*. And he must render an account at the end of his administration. If the estate turns out not to be insolvent, any surplus that remains after paying the debts and the expenses of the proceedings is returned to the bankrupt. The Course of administration.

Examination of the bankrupt.

bankrupt may be compelled to submit to an examination before an officer of the court as to his property, debts and dealings.

Discharge of the bankrupt.

After the proceedings are finished the bankrupt may apply to the court for a discharge from so much of his debts as remain unpaid, which application any creditor has a right to oppose. If the bankrupt has not been guilty of any fraud or misconduct either in the course of the proceedings or before their commencement in contemplation of bankruptcy, the discharge is usually granted, the law considering that when a person has been plunged into bankruptcy by mere misfortune without any fault of his, and has honestly given up all his property to his creditors, it is a less evil that his creditors should lose a portion of their dues and the bankrupt be left free to commence business again than that he should be embarrassed for years and perhaps for the rest of his life with a burden of old debts.

Composition by consent of court.

682. Sometimes after proceedings in bankruptcy have been begun the court will permit the bankrupt to make a composition with his creditors, that is, to enter into an arrangement with them to pay their claims or a portion of them on such terms as they may agree upon. The court usually has power to compel a minority of the creditors to consent to a reasonable composition that is opproved of by the majority or sometimes by more than a mere majority, for instance by two thirds. A composition generally provides for the payment of the debts in full or in part by instalments and the discharge of the debtor, and the debtor usually gives security for its performance. Upon its approval by the court the debtor's property is restored to him, and the bankruptcy proceedings are stayed, but may be revived if he fails to carry out the composition.

Voluntary composition.

A composition with his creditors is often made by a debtor without any proceedings in bankruptcy having been begun, by a voluntary agreement to which all the creditors become parties. Thus the expenses of bankruptcy are saved, and there is more to divide among the creditors. This can generally be done, and is the better way, when the creditors have confidence in the debtor that he will deal fairly with them. Although in general the payment of a part of a debt is no consideration for an agreement

Consideration.

to release the remainder, yet in a composition the giving security by the debtor or the mutual agreements of all the parties forms a sufficient consideration. If however any secret arrangement is made between the debtor and any creditor to give that creditor any advantage which the other creditors do not get, as for instance to pay him a larger proportion of his debt than is paid to the others, to give him additional security or to pay him a separate consideration for consenting to the composition, that is a fraud upon the other creditors and makes the composition voidable. But if it is done openly and with the consent of the other creditors, one creditor may be treated differently from the rest.

Fraud on the composition.

683. An assignment for the benefit of creditors, which is also called a general assignment, is a kind of private bankruptcy. It is where a debtor assigns the whole or a considerable part of his property to an assignee selected by himself, to be sold and the proceeds distributed among all his creditors or among certain creditors specified in the assignment or such as shall consent to it. Such an assignment, however, is an act of bankruptcy, and if bankruptcy proceedings are begun within due time thereafter, it is void against the assignee in bankruptcy.

General assignment.

An act of bankruptcy.

At common law in a general assignment the debtor may create preferences among his creditors, directing the assignee to pay some in full before paying anything to the others, a power which may easily be taken advantage of to give unjust preferences, as for instance to the debtor's own relatives and friends. At present however there are statutes regulating such assignments, which restrict the power of preference and contain various other provisions to prevent fraud and secure fair treatment of the creditors.

Preferences among creditors.

Statutory regulations.

CHAPTER XLVII.

PECUNIARY CONDITION.

Right of pecuniary condition.

684. There is still another right *in rem;* which has received no name because it has not generally been recognized as a separate right. It may be conveniently designated as the right of pecuniary condition. Its content is the holding of value or purchasing power in any form, the total value of all a person's belongings. Any pecuniary loss which a person suffers is a violation of this right. It is usually confounded with the right of property; but it differs from property in the following respects.

Relates to value.

685. (1) Property relates to the possession or physical condition of things, but has no relation to their value.[1] This right on the other hand has to do with the value of things, but not with their possession or physical condition, except indirectly so far as these may affect their value. Thus if A wrongfully tears down a building on B's land, that is a violation of the right of property in the land because it changes its physical condition, and also of B's right of pecuniary condition because the land is thereby made less valuable. But if A wrongfully builds an elegant mansion on B's vacant lot, and thus greatly enhances the value of the lot, that is equally a violation of B's property right, but not of the present right. On the other hand if A builds a high brick wall on the edge of his own land and so shuts off the view from B's windows and makes his house less valuable, B's property right is not violated, though his right of pecuniary condition is.

A single right.

(2) Each property right is a distinct and separate right, and, if a normal one, has a specific material thing for its subject. A person may have any number of property rights. But the right of pecuniary condition has no thing for its subject, and a person has only one general right of this kind, just

[1] See § 436.

as he has a single and indivisible right of bodily security or liberty.

Difference in the corresponding duties.

(3) The duties that correspond to the two rights are largely different. Those corresponding to the present right are mainly duties not to act fraudulently or maliciously, whereas most of those corresponding to property rights are duties of reasonableness merely or even peremptory duties, or if they are duties of intention, no more than simple intention, and not culpable intention, is meant. That is, if an act causes a violation of a property right, there is generally an actionable wrong, though the violation was merely negligent or was done with a simple intent to produce a certain consequence but in entire good faith and without any knowledge that the consequence was one that ought not to be produced, and sometimes though neither intention nor negligence was present; but if the result of the act is merely pecuniary loss, without any violation of the right of property, it is seldom actionable unless it was done with malice or intent to defraud. Thus if a tenant for life holds without impeachment for waste, he is ordinarily not guilty of any wrong against the reversioner if he commits waste. The reversioner's property right is not thereby violated, because that right is itself subject to the right of the tenant to commit waste. But if the tenant commits waste maliciously, with an intent to cause pecuniary damage to the reversioner, thus breaking a duty which corresponds to the right of pecuniary condition, and actually causes such damage, the reversioner may have an action for the wrong. So if A has a well upon his land, and B for his own purposes and without any intent to injure A excavates in adjoining land and so cuts off the supply of water from the well, A has no remedy, even though B does not own the land where he excavates and has no right to dig there, and even though A thereby suffers pecuniary loss. No property right of A's is violated, and B's act, not being malicious, is not a breach of any duty which corresponds to A's right of pecuniary condition, which is violated. But if the excavation causes A's land to cave in, then his right of support, which is a property right, being violated, he may have an action whether the act was malicious

or not, the duty that corresponds to the right of support being a peremptory duty not to remove the support; or if the act were malicious, he could sue for the injury to the well, basing his suit on the pecuniary loss.

Violation of a right imports damage.

686. The violation of any right, whether a right *in rem* or *in personam*, *i.e.* the impairment of any condition of fact which the law protects, is conclusively presumed to cause pecuniary damage, that is, to cause a violation also of the right of pecuniary condition This principle will be again adverted to.[2]

Deprivation of a right.

Another closely analogous principle is that every right is conclusively presumed to have a pecuniary value, so that to deprive a person of a right amounts *per se* to a violation of his right of pecuniary condition.[3] And in the same way

Assumption of a duty.

every duty may be said to have a negative pecuniary value. To be subjected to a new duty implies pecuniary damage; therefore it is a tort fraudulently to induce a person to enter into a contract and thus assume upon himself a duty, even before the contract is performed by him and even though it is in fact an advantageous one to him.

Loss of time and labor

So loss of time and expenditure of labor import pecuniary loss even though it is not shown that the party would otherwise have made any profitable use of his time or labor; but this is not true of the doing of any act which the party was already bound to do, *e.g.* if a person is induced by fraud to perform a contract which he had resolved not to perform.

Damnum emergens and *lucrum cessans.*

687. If a person is deprived of purchasing power which he already has in his hands, if his property is taken from him, destroyed or depreciated in value, if he is compelled or induced to pay out money, loses a valuable right or is subjected to a new duty, there is no doubt that his right of pecuniary condition is violated. But a person may also suffer pecuniary loss by being prevented from acquiring some gain which he would have acquired. These two kinds of loss are called by the civilians *damnum emergens* and *lucrum cessans.* As to the latter the authorities appear

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[2] See § 896.

[3] As to the difference between violating a right and depriving the holder of it, see § 250.

to hold that the being deprived of a gain which one would have made is not a violation of this right, and therefore can not be a ground for an action, unless the party had what is called a special right to acquire it.[4] In a leading case on this point the plaintiff was the owner of land with trees on it, to which wild rooks had long resorted to build their nests, and he had been accustomed to make a profit by taking and selling the young rooks. The defendant, maliciously intending to drive the rooks away and prevent others from settling there, and so to deprive the plaintiff of his profits, discharged guns near by and frightened the birds away, so that the plaintiff was unable to take as many young rooks as he otherwise would have taken. It was held that no wrong had been done to the plaintiff, no right of his having been violated. He had no property right in the old rooks, which were *ferae naturae;* and although he would have had a qualified property *propter impotentiam* in such of the young as were actually hatched in the nests on his land, the damage in this case consisted in preventing the old birds from nesting there at all. Nor, as the court thought, was there any deprivation of any gain which he had a special right to acquire. So where the plaintiff's father had made a will devising a farm to the plaintiff, and the defendant by fraud induced him to revoke it, it was decided that no right of the plaintiff's had been violated, he having no special right to acquire the farm.

When deprivation of a gain violates this right.

688. As to what constitutes such a special right to acquire a gain that its deprivation will amount to a violation of the right of pecuniary condition, no general rule has been laid down. But some particular cases have been adjudicated upon.

Special right to acquire a gain.

The profits which a person would make from a sale of his property, from carrying on any lawful business or from

Profits of a sale or of a business.

[4] The writer believes, and has in another place (Terry, Leading Principles of Anglo-American Law § 352 *et seq.*) tried to show, that the decisions to this effect are based upon a confusion of ideas, and are wrong. Perhaps if the matter were now properly presented to a court of last resort they would be overruled, and the more equitable and reasonable principle established that any deprivation of gain is a violation of this right.

any expenditure of capital or labor, even though in an isolated transaction and not strictly in the course of a regular business, are gains which he has a special right to acquire, and to deprive him of them is a violation of his right. Thus where the plaintiff had made a decoy pond on his land for the purpose of attracting wildfowl which he caught and sold, and the defendant maliciously frightened them away, this was held a tort, the court saying that the plaintiff had expended money and skill in bringing the birds there, and that that was a profitable way of employing land and a species of trade.

Performance of a duty.

A person has also a special right to acquire any gain which would come to him by the performance of any contract or perfect legal duty owed to him by another person. Therefore it is a violation of right fraudulently to induce a party to a contract to break it or maliciously to prevent an officer from serving a writ in an action, whereby the plaintiff loses his debt or remedy. Perhaps the same rule applies to an imperfect legal duty.

Imperfect duties.

Legal relations.

Any gain which a person might get through a recognized legal relation in which he stands seems to be also considered as one to which he has a special right. Thus to entice a person's servants to leave him when they have no right to leave is a violation of his rights in the servants.[5] But even though they have a right to leave, maliciously to entice them away or to intimidate them so that they refuse to work may be a wrong, if it causes a pecuniary loss to the employer.

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[5] See § 1009.

B. DUTIES CORRESPONDING TO RIGHTS *IN REM.*

CHAPTER XLVIII.

DUTIES.

Arrangement of duties.

689. Having treated of rights *in rem*, *i.e.* certain states of fact which the law protects, it is now necessary to discuss the corresponding duties, *i.e.* the acts which the law commands or forbids because they tend to conserve or impair those states of fact. The possible acts which a person may do are infinite in number and variety, and can not be divided into groups as few and as clearly defined as the states of fact which make up the contents of rights. Therefore the lines between the different duties have to be somewhat arbitrarily drawn; different persons would probably draw them differently. There is not any authoritative or generally accepted grouping of the various kinds of conduct under heads as separate legal duties. At common law the forms of action, which will be hereafter described,[1] furnished a scheme for the arrangement of duties; and by the old writers duties were generally treated of incidentally in connection with the actions by which breaches of them were redressed.[2] But that arrangement never had any scientific or logical character, and the old form of action are now disused.

In the classification of duties here adopted no attempt has been made to define them so that they shall be mutually exclusive. They are often recognized in law as overlapping upon each other, so that the same act or omission may be a breach of several different duties. In a general way the division of duties in § 242 is followed, peremptory duties coming first, then duties of reasonableness and lastly duties of intention. But that order will not be strictly adhered to, because it

1 See § 901.

2 See § 53.

would involve the separation of things that are more conveniently treated of together.

Exceptions to duties.

Most legal duties are subject to exceptions and qualifications. For the most part in an elementary work like this these must be omitted; they often run into subtle and complicated distinctions. In a few cases in this chapter specially important exceptions which are peculiar to particular duties will be mentioned in connection with those duties, while in the next chapter certain exceptions of a more general character will be taken up.

I. General Peremptory Duties.

Direct forcible injuries.

690. A person must not do any act, of which the actual direct consequence is a physical interference with another's person or property. Striking another person, seizing and holding him, throwing a stone and hitting him, entering upon land, taking possession of or breaking a chattel, scribbling something upon another person's document are among the kinds of acts forbidden. Shooting at a person but missing him is not a breach of this duty, because no actual harm results; nor is it even if the person shot at is badly frightened and, being a weak and nervous person, is thereby made sick, because there is no direct physical interference with him. Digging a hole in the highway, into which another person falls in the night and is hurt, does not come under this duty, the damage being indirect. This duty relates only to acts; causing damage to another by mere omission, even wrongful omission, is not a breach of it.

Intention and negligence.

As above stated the duty is a peremptory one, *i.e.* a direct physical interference with another's person or property is a breach of the duty even though neither intentional nor the result of negligence, as for instance if a person throws a stone and accidentally, without any fault on his part, hits another. That seems to have been the common law rule, though there is some doubt on this point. But there is much modern authority for holding that the duty is merely not to do such injuries intentionally or negligently, and in some of the United States this principle, which is more consonant with justice, is now

established. All the authorities, ancient and modern, agree that inevitable accident, *i.e.* an injury that could not have been foreseen and avoided even by extreme care, is excused. Inevitable accident.

691. A person must not do any act in the attempt or apparent attempt to do an immediate and direct bodily harm to another, so as to cause to the other a reasonable apprehension that such a harm is about to be done him. This is the duty which corresponds to the right of mental security mentioned in §421, and the same kinds of acts which cause a violation of that right are breaches of this duty. Attempts at direct forcible injuries.

692. A person must not by his act remove the support of land and so cause the land to fall, in violation of another's right of support. Intention or negligence is not necessary to a breach of this duty. A person is guilty of a breach of it who excavates on his own land and thereby causes his neighbor's land to cave in, even though he does not intend to produce any such result and takes all possible pains to prevent it. The violation of the right need not be the direct consequence of the act, but must be its proximate consequence. This duty does not forbid the taking away the natural support of land, if some artificial support is put in its place; the duty is not broken until the land is actually caused to fall. Removal of support.

693. A person must not take possession of a thing in violation of another's right of possession in it. An act which is a breach of this duty will generally be also a breach of that in §690, but is not necessarily so, because possession may be taken of a thing without actual physical contact with it. If a possession so wrongfully taken is continued, the taking is deemed to have been repeated and a fresh breach of the duty committed each day that the possession continues. This is a purely negative duty, a duty not to take possession; it is not a duty to restore the thing to its owner. There is in some cases a duty to restore; but that is a different duty.[8] The general duty as to possession.

There is a similar duty not to take possession of incorporeal things.

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[8] See § 800.

II. Duties to Use Care.

The general duty as to negligent acts.

694. A person must not do any act which is negligent from its tendency to cause physical injury to the person or property of another. Examples of such acts are riding too fast in a crowded street, handling firearms or explosives carelessly, throwing a heavy object out of a window into a street when persons are passing, running a heavy railroad train over a rotten and unsafe bridge, or for an apothecary carelessly to put up a deadly poison, label it with the name of a harmless medicine and sell it. This duty to abstain from negligent acts is a general duty resting upon all persons in all circumstances. There is no similar general duty to abstain from negligent omissions, *i.e.* to do such acts as are reasonably necessary to prevent harm to others. Duties to do acts arise only out of special circumstances, for instance from some previous conduct of the party himself which creates the necessity for them.

The ordinary duty to take precautions.

695. A person who is doing or has done an act which is likely to cause a physical injury to the person or property of another must use due care to take such precautions as are necessary to prevent such injury. The original act may be lawful or unlawful. Thus if a person without the permission of the proper authorities digs a large hole in the highway and then leaves it open all night unlighted and unguarded, the original act is wrongful, and the subsequent omission to take precautions against injury to travelers is also a breach of this present duty. But if the necessary permission has been obtained, the mere making the excavation is lawful, and the only duty is to take care about it after it is made.

Doing lawful acts in an improper manner.

When the omission to take proper precautions occurs at the time of doing the original act, so that the act and the omission together can be considered as a doing of the act in an improper manner, it becomes difficult, and is generally unnecessary, to distinguish this duty from the preceding one. Thus if a surgeon cuts off a limb and neglects to take proper

precautions to stop the bleeding, we may say that performing the amputation in that manner is a negligent act or that he is simply guilty of a negligent omission.[4]

Delivery of dangerous things.

One frequent and important case of this is the delivery of a dangerous thing to another without informing him of the danger, as in selling dangerous explosives to ignorant persons, or sending them by a carrier so packed that their dangerous nature is not apparent. But to this branch of the duty there is an important exception. A landlord may let premises in as dangerous a condition as he pleases without being bound to give the tenant any warning of the danger, if that arises from the obvious plan, arrangement or construction of the premises or from defects which might be ascertained by the tenant by a careful examination. But for a secret danger, which could not have been detected by such an examination, the lessor may be liable unless he warns the tenant, *e.g.* if the house is infected with small pox. The same rules apply between the buyer and seller of land.

Letting or selling dangerous premises.

The duty of an inviter.

696. A person who invites another to put himself or his property into a situation of danger, of which the inviter knows or ought to know, must use due care to take such precautions as are necessary to obviate the danger. Thus a storekeeper or warehouseman, who invites persons to come to his place of business or to store their goods in his warehouse, must use due care to keep the place and its approaches reasonably safe for them. And it has been held that a tavern keeper who voluntarily permitted drunken and quarrelsome persons to remain in his place was liable to a customer who came in to drink and was assaulted and beaten by one of them.

Only owed to persons invited.

A person may be or may have his property in a place: (1) by virtue of a right, as where A crosses B's land over which he has a right of way, (2) by invitation, (3) by mere license or permission, (4) as a trespasser or wrongdoer. This duty is only owed to persons invited. Persons who have rights are protected by the duties as to dangerous things and nuisances presently to be mentioned, and to mere licensees

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[4] See § 870.

and wrongdoers no duties as to the condition of the place are owed. If for instance a person goes upon land where he has no right to go, or goes there by the mere permission or acquiescence of the owner of the land, and falls into a well which the owner has negligently left open and unguarded, and is hurt, he has no remedy.

Family and guests.

A person's own family who live in his house are deemed for this purpose to be merely licensed and not invited to be there. A guest, though in the ordinary sense of the term invited, stands in a middle position, and is entitled to protection not against all dangers but from hidden dangers in the nature of traps which are known to the host. But a person who knowingly and voluntarily leaves a dangerous thing which is attractive to young children or animals in a place where they will be likely to find and meddle or play with it, even though they would be mere wrongdoers in so doing, is considered to have invited them. Railroad companies have several times been held liable for leaving turntables unfastened and unguarded in places on their own premises where children would naturally be attracted to play with them and not taking any precautions against their doing so. But some authorities deny this.

Tempting children and animals.

Voluntary taking of risk.

If the person invited has notice of the danger and capacity to appreciate it and can protect himself against it by using ordinary care, then if he voluntarily accepts the invitation he is in most cases considered to take upon himself the risk of it and the inviter is not responsible for it. Therefore generally the inviter may practically perform his duty by giving notice to the person invited of the danger. But if the person invited has, in addition to the invitation, some right to be or put his property in the place, he is not considered to have taken the risk of the danger even though he knows of it, as for instance when a passenger on a railroad train at the end of his journey gets out at the station, as he has a right to do, and the station is in a dangerous condition.

III. Duties as to Dangerous Things and Nuisances.

Dangerous things and nuisances.

697. Any sort of a thing, however innocuous in itself, can be used as the instrument of committing a wrong. But

there are certain kinds of things as to which, because of their peculiarly harmful or dangerous qualities, the law imposes special duties with a view to prevent damage from them. These are actively dangerous things and nuisances. The former are commonly things which are useful and even necessary, so that the law does not seek to prohibit their existence and use, but merely to surround it with special precautions.

Actively dangerous things.

698. An actively dangerous thing is one which has an active tendency to do harm, or perhaps serious harm, to persons or property, such as gunpowder and other explosives, water stored in an artificial reservoir which may break out and do damage, dangerous animals, and noxious substances liberated in a medium, such as water, whereby they may be diffused. But poison, an obstruction upon a railroad track or a defective railroad bridge, though they may be very dangerous, are not actively dangerous things; they will do no harm if they are let alone.

The strict duty as to actively dangerous things.

699. A person who voluntarily has an actively dangerous thing in his possession, or who voluntarily brings it into a place of which he has possession or voluntarily suffers it to remain there, if he knows or ought to know that it is such a thing, must prevent it from doing the kind of harm to persons or property the tendency to do which constitutes it an actively dangerous thing. This is not merely a duty to use care; it is peremptory The party must prevent the harm from ensuing, and may be liable for damage done by the thing even though he is free from all blame. It is not unlawful to keep such things in one's possession; but a person does so at his own peril. This duty, except as to fire and dangerous animals, is of very modern origin. The leading case upon it, and the first in which it was distinctly laid down, was Rylands v. Fletcher,[5] which was decided in 1868, so that the rule is generally known as the rule in Rylands v. Fletcher. In that case the defendant lawfully made an artificial reservoir on his own land, and without any negligence or fault of his the water broke out and flooded the plaintiff's mine. The

The rule in Rylands v. Fletcher.

[5] L. R. 3 H. L. 330, 37 L. J. Ex. 161.

defendant was held liable. Since he had voluntarily brought the water upon his own land for his own purposes, he was absolutely bound to keep it from doing harm.

The American law.

In some of the United States this strict duty does not exist at all except as to animals; but the possessor of a dangerous thing is only bound to use care. And even in those places where the strict duty is admitted, it is subject to various exceptions, the most important of which are as follows.

Exceptions to this duty.

Fire.

700. Fire is undoubtedly an actively dangerous thing, and at common law a person who started or kept fire on his premises was liable, irrespective of negligence on his part, if it spread and burned the property of others. But this is not now the rule anywhere, at least as to fire used for domestic or business purposes.[6] Railroad companies have often been held not liable for damage by fire accidentally communicated from their locomotives.

Natural use of land.

If the dangerous thing is brought or kept upon land in the course of the natural or ordinary use of the land, the possessor is exempt from this strict duty and is merely required to be careful to prevent harm. Making an artificial reservoir on land is not a natural and ordinary use; but building a house is, so that if the wall of a house falls and injures some one, the possessor of the house is not responsible unless it happened by his fault. So if the upper and lower parts of a house are in different hands, and waterpipes in the upper story burst without any one's negligence and the lower story is flooded, the upper tenant is not responsible, bringing in water by pipes being deemed an ordinary use of the house.

Act of God nd *vis major*.

If the damage is caused by what is called the act of God, *i.e.* any violent and unusual operation of nature,[7] or by *vis major*, *i.e.* some forcible intervention from outside, the possessor is not held responsible, for example if a dam is broken and water let out by an earthquake or by the wrongful act of a third person.

Legislative permission.

If a person has a special permission from the legislature to keep or use a dangerous thing, as for instance a railroad

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[6] Perhaps in England only for domestic purposes. Pollock on Torts, 450.

[7] See § 816.

company to use the locomotives, he is not liable for injury done by it unless that is due to his intention or want of care.

The duty as to dangerous things generally.

701. A person who has the possession or detention and control of a dangerous thing, whether actively dangerous or not, must use due care to prevent it from doing harm to persons or property. For example the possessor of animals sick with an infectious disease should be careful to prevent its being communicated to others' domestic animals. This duty will cover most cases where the possessor of an actively dangerous thing is excused from the strict duty, for instance that of a sheriff who seizes and keeps in his possession a dangerous thing in the course of his official duty, he not being a voluntary possessor.

Duties as to animals.

702. Animals are actively dangerous things. Cattle have a natural inclination to stray away and trespass upon land, and various animals have a propensity to bite, kick, or scratch or use whatever weapons of offence nature has armed them with. Thence arise certain duties as to animals, which may be regarded as falling under the strict duty as to actively dangerous things, but are more conveniently treated of separately.

The duty to keep animals from trespassing.

703. The voluntary possessor of animals must prevent them from entering upon other peoples' land. This duty is peremptory; if the animals trespass, the possessor is responsible though he has used due care to prevent it. Thus if a stranger unlawfully turns A's cattle into the highway, from which they stray into B's land, A is liable.

Fences.

At common law it made no difference whether the land upon which cattle trespassed was fenced or not. No one was bound to fence his land. But in most of the United States by statute fences of a certain description are to be maintained around land, and a landowner has no remedy if cattle enter upon his land for want of a "lawful fence."

Cattles driven along the highway.

Since however it is necessary to drive cattle along the highway, there is no peremptory duty to prevent them from straying into adjacent land while being so driven, but only a duty to use care.

Small animals.

This duty does not apply to small animals which are usually let run at large, such as dogs or hens. But probably it may be created by a request to keep them off.

The duty as to dangerous animals.

704. The voluntary possessor of an animal which he knows or ought to know to have a propensity to do any particular kind of harm to persons or property, for instance a dog which he knows is inclined to bite, must absolutely prevent it from doing that kind of harm. It has been said that the mere keeping of such an animal is wrongful. But that is not so. If a person chooses to keep a ferocious dog, a vicious bull or even a lion or a tiger, he has a legal right to do so, but he keeps it at his own risk. On the other hand various judges have declared that the liability for injuries from dangerous animals rests upon some kind of presumed or constructive negligence, that the law will assume that the party has been in some way lacking in due care, or even that the mere keeping of such creatures is a kind of negligence. But that is a useless fiction; it is now well settled that negligence not a condition of liability.

The *scienter*.

The possessor of the animal is not subject to this duty unless he knows or ought to know of its dangerous nature. In an action for an injury from a dangerous animal the plaintiff must prove that the defendant kept it knowingly, *scienter*; hence proof that he had such knowledge is technically called proof of the *scienter*.

Animals of a dangerous kind.

The possessor of an animal is conclusively presumed to know that it has such dangerous propensities as are common to its species. Therefore if a person will keep a bear, a monkey, a male deer at certain seasons of the year, or any other wild and fierce beast, he can not be heard to say that he did not know that it was inclined to attack mankind and other animals. No proof of the *scienter* is required. But animals which are usually tame and harmless, although vicious individuals are sometimes found among them, such as dogs, horses, bulls or rams, are not presumed to be dangerous, and to charge their possessor with liability for their misdeeds he must be proved to have had actual or implied notice that the individual in question was dangerous. It is sufficient to prove

Animals usually harmless.

Evidence of knowledge.

that the creature has once before done or attempted to do similar mischief, *e.g.* in an action for injuries from the bite of a dog, that the dog had at some previous time bitten somebody, and that the possessor knew of it.

Meanings of nuisance.

705. The word nuisance is used in two senses, to denote sometimes a kind of wrong and sometimes a thing by whose instrumentality such a wrong is or may be committed. In this chapter the word will be employed in the latter meaning only. Since to make a complete wrong there must be a breach of duty and a violation of right, it follows that a thing may be a nuisance in the latter sense and yet there be no wrong committed; in other words it need not be an actionable nuisance.[8]

Actionable nuisance.

706. Nuisances which may cause violations of private rights are of three kinds.[9]

Nuisances by position.

(1.) Things whose mere presence where they are violate property rights, *e.g.* anything placed upon land, water set back upon land by a dam, a fence built across a private way, the roots of a tree spreading to adjacent land and there running into a well and polluting the water, a vessel carried by floating ice against a bridge. But the violation of right must not be a merely technical one, but such as to cause or threaten substantial damage. To toss a pebble upon another's land is a violation of right, but the pebble would not amount to a nuisance. However, an interference with property which if continued would in time create a right by prescription is regarded as threatening substantial damage, *e.g.* the eaves of a house projecting over adjacent land of another person.

Extent of the violation of right.

Active nuisances.

707. (2.) Things which emit or change the direction of water, smoke, offensive vapors or smells, wind, vibrations, electricity or other noxious things or agencies, which invade property and cause a violation of property rights.[10] But the incursion of such impalpable things does not amount to a nuisance unless they are injurious or annoying to persons or things of ordinary

Special susceptibility.

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8 Compare § 292, as to negligence.

9 The rules of the criminal law are wider; see § 1182.

10 See § 436.

susceptibility, are more than offences against mere delicacy of taste, fastidiousness or extreme susceptibility. Thus where gas from the defendant's chemical works caused damage to the plaintiff's factory, it was held that the plaintiff had no remedy for so much of the damage as was due to the fact that he used in his manufacturing process a chemical or dyestuff not commonly used and of a kind particularly liable to be affected by such gases.

Things capable of being used as nuisances.

A thing is not a nuisance merely because it can be used so as to cause or amount to one, nor even because such will be the effect of its ordinary use. Thus if a house has a chimney so situated that a fire can not be made in it without creating a nuisance to neighboring houses by the smoke, still the house or the chimney is not itself a nuisance without the fire.

Dangerous nuisances.

708. (3.) Anything which, being what and where it is, is unreasonably dangerous to persons or property being where they are by virtue of a right, is a nuisance, *e.g.* large quantities of gunpowder stored close to dwelling houses, electric wires strung in a street carrying a strong current and not properly insulated, a dog that has been bitten by a mad dog and is suffered to run at large, any filthy or noxious substance deposited where it is liable to be washed by water on to another's premises, an object in the highway calculated to frighten horses of ordinary quietness, an excavation so near to a highway as to make the use of the highway dangerous, even though the danger is from the chance of inadvertently stepping aside from the highway.

Things in defective condition.

A thing may become a nuisance by being defective or out of repair, if it is thereby made dangerous. But merely being out of repair does not make a thing a nuisance unless it is dangerous. A ruinous building or a rotten fence is not necessarily a nuisance.

Actively dangerous things.

A thing may be both an actively dangerous thing and a nuisance, *e.g.* a vicious bull turned loose in the street. But if kept properly confined the bull would not be a nuisance.

The legal treatment of nuisance.

709. The general policy of the law is to suppress nuisances altogether. But sometimes it permits them to exist, but hedges them around with special restrictions. Duties as to nuisances

are therefore of three sorts, namely: (1) not to cause them by acts; (2) to do acts to prevent them from existing; and (3) to prevent them from doing harm.

The duty not directly to make nuisances.

710. A person must not do any act the actual direct consequence of which is to cause or continue the existence of a nuisance. Placing something upon another's land, digging a hole in a highway which makes it dangerous for travellers, erecting an unsafe building where it is likely to fall upon another's house or into a highway, making a fire where it will emit smoke so as to be a nuisance, and hammering upon iron plates in a boiler shop so as to make a nuisance by noise, are breachs of this duty.

The duty not intentionally or negligently to make nuisances.

711. A person must not do any act with the intention of causing or which is negligent from its tendency to cause the existence or continuance of a nuisance. Examples of the breach of this duty where the nuisance is the indirect consequence of the act, so that the case does not fall under the preceding duty, are negligently cutting loose a vessel so that she shall drift down and get foul of another; negligently turning cattle into a pasture with an open gate, through which they may escape into the highway where they will be nuisances; shipping a quantity of gunpowder by rail without notice to the railroad company of what it is, knowing that the company will haul the car containing it onto a siding where it will be a dangerous nuisance.

Duty of a possessor to prevent a nuisance.

712. The possessor of a thing must use due care not to let it become a nuisance. Thus if a person lawfully by permission of the city authorities makes a vault for coal under a sidewalk in a city, with a hole in the sidewalk communicating with the vault and a lid to the hole, he must use due care to keep it in safe condition.

Duty of an unlawful possessor.

If a person unlawfully puts or keeps a thing, or causes or maintains a condition of things, in a place, and has possession, he must absolutely prevent it from becoming a nuisance. It is not enough to use care. Thus where the defendants unlawfully made an excavation in the highway and covered it with a flagstone so that it was perfectly safe and did not interfore with the use of the street, they were held liable when the

stone was broken and the street thus made unsafe by accident or by the unlawful act of a third person.

Duty of a person acting under an authority.

713. A person who is authorized to do an act or maintain a condition of things must use due care so to do or maintain it, or to take such precautions, that it shall not be a nuisance, or, if a nuisance is inevitable, that it be as little of a nuisance as possible. Thus if a railroad company is authorized to use locomotives and the escape of sparks from a locomotive can not be prevented, the railroad company must not negligently permit such an accumulation of dry and inflammable rubbish by the side of its track as will in case of sparks falling upon it be a source of danger.

Duty of a wrongdoer to abate a nuisance.

714. A person who has wrongfully caused the existence of a nuisance must abate it, *i.e.* make it cease to be a nuisance, at once.

Duty of a possessor to abate.

A person in possession of a nuisance, if he knows or ought to know that it is such, must use due care to abate it as soon as he reasonably can. Thus if a person's house close to the highway burns down, but the front wall remains standing and is dangerous, the proprietor should pull it down or otherwise make it safe. Probably the possessor can get rid of this duty by abandoning the possession. If for instance a vessel is sunk so as to obstruct navigation, probably the owner may abandon the wreck and free himself from this duty.

Abandonment of possession.

Duty to prevent a nuisance from doing harm.

715. A person who is authorized to make or keep a a nuisance must use due care to prevent it from doing harm. Thus a water company, having received permission to make an excavation in the street, which is a nuisance, to lay its pipes, must use due care to keep it lighted or guarded at night and to take such other precautions as may be proper.

Duties of owners of nuisances.

716. Duties as to nuisances rest on the possessor of the thing rather than on the owner, *e.g.* on the tenant of land rather than on the landlord. But a landlord who lets a house to be used in a way which will cause a nuisance, or knowingly permits his tenant to maintain a nuisance when he has the power to prevent the tenant from doing so, or who lets premises with a nuisance on them of his own making, will generally, as well as the tenant, be responsible for the nuisance; and

in other cases on similar principles the owner of a thing may be responsible for a nuisance made or maintained by the possessor.

717. Duties as to nuisances are subject to exceptions, some of the more important of which are the following. Exceptions.

Generally if a nuisance is put into a person's possession without his consent, and he does not use or actively maintain it, he is not subject to any active duties as to it except to such persons as request him to abate it, and not even to them if he gives them permission to do the necessary acts. Thus if a stranger wrongfully builds a dam in a stream on A's land and thus floods B's land, A need not remove the dam unless B requests him to; and not then, if he gives B permission to enter upon the land and do so. Involuntary possession of a nuisance.

A person who lawfully acquires possession of a nuisance not knowing it to be such or supposing in good faith that he has acquired a right to keep or use it, may generally go on maintaining or using it until he has been notified of his want of right, or perhaps been requested to discontinue, by some person interested. Thus the grantee or lessee of a mill with a dam which unlawfully sets back water upon neighboring land may continue its use in that manner until notified to stop, if he reasonably believes that his grantor or lessor had an easement to flood the land, such easements being very common; but the grantee of a city house with a dangerous unfenced area opening in front close to the sidewalk can not reasonably suppose that any easement exists against the public to keep it in that condition. Acquisition of a nuisance in good faith.

The fact that the nuisance is caused in the course of carrying on a lawful trade in the usual manner in a place that is convenient and suitable for the purposes of the business itself, that the nuisance exists only a small part of the time, that the injury caused by it is slight compared with the benefits arising from its existence either to the party maintaing it or to the public, or that on the whole it might be considered reasonable to permit the existence of the nuisance, will not excuse a nuisance. A soap factory or a boiler shop in a thickly populated part of a city may cause an actionable nuisance by Convenience, counterbalancing advantages and reasonableness.

smells or noise, though the business is a lawful one and is carried on in a proper and usual manner. So an unauthorized railroad in a highway is a nuisance, though it may be a great convenience to the public. On the other hand if people will live close together they must submit to some annoyance and inconveniences; and therefore those incidental small nuisances which arise in the ordinary use of property and the conduct of the ordinary business of life, such as ringing of church bells and blowing of factory whistles, burning rubbish, emptying cess-pools, making noise in doing repairs, lowing of cattle in barns, playing on musical instruments and many other like things are not wrongful if done in a reasonable time, place and manner and not with a malicious intent to injure or annoy others.

Trifling annoyances.

IV. Duties as to Intention.

Intentional injuries to persons and property.

718. A person must not do any act with the intention of thereby producing a physical interference with another's person or property, or a violation of any property right, including abnormal property. Intention here means simple intention to produce the result; it is not necessary that the actor know of the circumstances that make his act wrongful. Thus if A takes possession of, sells or destroys B's goods, supposing them to be his own, he is liable to B for an intentional wrong. So where the bailee of a certificate of stock, acting in good faith and misled by a forged order purporting to come from the owner, surrendered the certificate to the corporation and had it cancelled and a new one issued in its place to another person, he was held responsible to the owner.

Direct and indirect injuries.

Whether or not intention or negligence is necessary to a violation of the general duty as to direct injuries in §690, most direct injuries are in fact intentional, and are therefore breaches of this duty also. Examples of its breach where the violation of right is not the direct consequence of the act are digging a hole with an intent that some one shall fall into it, placing an obstruction on a railroad track to wreck a train, giving a person a deleterious drug with an intent that he shall swallow it, setting spring-guns upon land to shoot trespassers.

But it is not a breach of this duty to build a wall close to another's land for the purpose of cutting off his view, there being no property right in a view.

Wrongful transfers of possession.

It is generally a breach of this duty for the possessor of a thing who has only limited rights in it, or a mere detentor, to deliver the possession to a third person in excess of his rights, as where a bailee sells and delivers the chattel to a stranger, or a servant sells and delivers his master's property which is in his custody, or the borrower of a chattel lends it to another person.

Violations of abnormal property rights.

Acts which cause violations of easements, franchises, patents, copyrights, trademarks and other abnormal property rights are usually breaches of this duty.

Intentional injuries to liberty and privacy.

719. A person must not do any act with the intention of producing a result which will be, and which he knows or ought to know will be, a violation of another person's right of liberty or privacy. Thus if A locks the door of a room, he intends to fasten up that place of exit. If B is in fact in the room and there is no other way to get out, B is imprisoned. But A is not guilty of a breach of this duty unless he knows or ought to know that B is there.

Malicious injuries.

720. A person must not do any act with a malicious intent to injure another by violating any of his rights, including the right of pecuniary condition.[11] Malice here means actual malice, which, as already explained, implies that the injury or damage is the very result desired. Thus it is a breach of this duty to go to a theatre and hoot and yell at an actor with intent to prevent him from performing and to cause damage to him, or to fire cannon at negroes on the coast of Africa in order to frighten them and prevent them from coming and trading with another's ship. So in New York, where a mortgage of land is a mere hypothecation, the mortgagee can not have any action against a third person for a negligent injury to the land, whereby its value is lessened and the mortgagee's security is impaired; nor even for an intentional injury, if the intention is simple inten-

[11] See § 685 (3).

tion merely, *e.g.* if the third person cuts timber on the land by the permission of the mortgagor not knowing of the mortgage. The mortgagee has no property right in the land to which any duties as to mere negligence or simple intention correspond. But if the injury is done with a malicious intent to impair the mortgagee's security, that is a breach of the present duty; and if such a result follows, there is a violation of the mortgagee's right of pecuniary condition, to which this duty corresponds, and a complete wrong against him.

Boycotting. Boycotting by inducing third persons by threats or intimidation not to deal with, employ or work for a person, in order by injuring his business to coerce him to do something, has been held to be a breach of this duty; and this, even though the thing which he is coerced into doing is one which he ought to do and the ultimate motive of the boycott is to get justice. The proximate intent to injure his business is itself malice. But the law on this subject is still in an unsettled condition.

Exception to this duty. **721.** This duty is subject to an important exception, which does not apply to the two preceding duties and which it is difficult to define exactly. On the one hand the presence of malice will undoubtedly often make an act unlawful which without it would be lawful; but on the other hand it has been repeatedly laid down, that if an act is "lawful in itself" it will not be made unlawful by being done maliciously. An act lawful in itself means simply an act which is lawful without regard to the state of mind of the doer, so that the statement that malice will not make such an act unlawful is a mere tautology and conveys no precise information. It simply amounts to saying that there are exceptions to the duty now under discussion, but does not tell us what the exceptions are.

Acts lawful in themselves.

Statement of the exception. The exception should, it is believed, be stated somewhat as follows. There are certain acts which are usually done from good motives and are usually beneficial in their effects, so that, since it is necessary for the law to leave considerable liberty to people in the conduct of their affairs, it is on the whole expedient to permit such acts to be done without inquiring into the motives of the doer, even though that liberty may sometimes be abused. Such acts are often described as done

in the exercise of the doer's own rights. No attempt will be made here to enumerate all the kinds of acts that fall under this exception, but a few of the most important call for notice. Exercise of one's own rights.

Such acts as are ordinarily done in the use and enjoyment of property may be done from any motive. "It is plain that the right to use one's own property for the sole purpose of injuring others is not one of the immediate rights of ownership; it is not a right for the sake of which property is recognized by the law, but is only a more or less necessary incident of rights which are established for very different ends." Ordinary use of property.

If A is the owner of land with a well on it, and B makes an excavation in adjoining land and so cuts off water which would otherwise have come to the well by percolation through the soil and causes the well to dry up, to A's pecuniary damage, no property right of A is violated. But if B is not the proprietor of the land where he excavates, and does the act with a malicious design to injure A, he breaks the present duty, which corresponds to A's right of pecuniary condition, and A may have an action against him for the wrong. If however B makes the excavation on his own land, it is generally held that he is protected by this exception, and is not liable to A even though he acts maliciously. So it has been held not unlawful for the owner of land to erect cheap tenement houses on it close to a neighbor's house and fill them with negroes, for the mere purpose of annoying his neighbor, depreciating the value of his property and coercing him to sell it at a low price. But in some of the United States it has been thought that such uses of property may be wrongful if they can be shown to have been done not simply maliciously but from no other motive, from "unmixed malice."

722. The law is very careful to protect the freedom of labor and the right of every man to sell his labor to the best advantage. Therefore it is not a breach of this duty for one person to persuade another's servants to desert their employer and enter into his service, no matter from what motives.[12] But Hiring of servants.

[12] If the servants have no right to leave, the act may be a breach of another duty. See § 1009.

it is unlawful, as not coming within the principle of this exception, for a person to entice or coerce another's servants to leave him, not for the purpose of hiring them himself but merely to injure the employer, even though the servants have a right to leave.

Strikes.

A strike by working men, so far as it consists merely in a concerted refusal to work and is not accompanied by violence, is not wrongful as being a breach of the present duty, though it may be a breach of their contract with their employer. The men have a right to be idle if they choose.

Discharge of servants.

The rights of masters are not inferior to those of servants, so that a master, unless his contract with the servant prevents, may discharge a servant at his pleasure for any cause or for no cause, *e.g.* because he trades at a particular store whose proprietor has incurred the master's ill-will.

Trade competition.

Closely analogous to the right to dispose of one's labor for hire is the right to carry on a lawful trade or occupation, and it is equally favored by the law, "Competition is the life of trade," and mere business competition, however severe or ruinous to competitors, is not wrongful. A man has a perfect legal right to engage in and prosecute a business from no motive whatever but to ruin another by underselling him.

Enforcing contracts.

It is lawful for one party to a contract to call upon the other party to perform it, no matter what his motive, *e.g.* for a person to collect the bills of a bank and present them for payment in a mass at a time when the bank is known to be unable to pay them, with a malicious intent to injure the bank's credit.

Bringing suits.

A person is legally justified in bringing an action at law or persuing a legally appointed remedy when he has a good cause of action, even maliciously. Thus where a corporation hired a piece of land for the mere purpose of enabling it to bring an action against another corporation, and then brought the action, it was held to be not wrongful.

Maliciously procuring a breach of contract.

723. Maliciously inducing a party to a contract to break it would seem to be a plain breach of this duty. And in that manner to procure a breach of a contract for services is undoubtedly wrongful. But whether in regard to other sorts of contracts a wrong can be so committed is still doubtful. The

ground of the doubt, however, seems to be not whether the act is a breach of duty but whether, the direct cause of the injury being the wrongful refusal of the party to the contract to perform it, the malicious inducement is not a remote cause merely. The reason for the distinction between contracts of service and other contracts probably is that the relation between master and servant, though at present generally created by contract, is regarded as somewhat different from an ordinary contract relation, as being a kind of status; the master has rights *in rem* in his servant.[13] Then the principle was extended by a false analogy to contracts for service which did not create the technical relation of master and servant.

Fraudulent misrepresentations.

724. A person must not make a fraudulent misrepresentation to another. The nature of a fraudulent misrepresentation has been already described. This duty corresponds to all rights. Causing any sort of injury by fraud is wrongful, including the fraudulently inducing a person to break a contract.

Malicious prosecution.

725. A person must not institute or carry on a groundless prosecution against another maliciously and without probable cause.

Meaning of prosecution.

To prosecute a person means to institute, or make a complaint to a public officer for the purpose of having instituted, or actively, intentionally and voluntarily to aid in the carrying on against him, of any criminal prosecution or any civil proceeding looking to his arrest, the seizure of his property or the impairment of his status, *e.g.* having him declared insane or bankrupt. Since the statute of Marlbridge[14] which allowed costs to successful defendants in civil suits, it has been held in England that an ordinary civil action is not a prosecution for this purpose, the costs being supposed to be a full compensation for all damage to a person from an unfounded suit against him. In some of the United States the same rule prevails, but in most the rule is the other way, and a mere civil suit is held to be a prosecution.

Civil actions.

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[13] See § 1009.

[14] 52 Hen. VI.

The prosecution must be groundless.

To amount to a breach of this duty the prosecution must be without grounds. If it was in fact well grounded, there is no breach of duty in instituting it; and the fact that it was successful is conclusive proof for this purpose that it was well grounded. If for instance A prosecutes B on a charge of theft, and B is convicted of the crime, even though he is in fact innocent and the conviction is due to the mere blunder of the jury, A is considered to have had grounds for prosecuting. Therefore an action for a malicious prosecution can never be maintained while the original prosecution is pending; the plaintiff in such an action is always required to show, in order to maintain his action, that the prosecution has ended in failure.

Termination of the prosecution.

Probable cause.

726. Probable cause implies (1) that the prosecutor really and in good faith believed that there was ground for the prosecution, and (2) that his belief was reasonable. If A prosecutes B for a crime, he must believe him to be guilty; if he does not, he has no probable cause for the prosecution, if B is in fact innocent, however much appearances may be against B. Also a prosecution should not be set as foot on mere suspicion, but on reasonable grounds of belief. If the prosecutor before beginning the prosecution takes legal advice, and after a full, fair and true statement to his counsel of the facts within his knowledge, is advised that there is a good case for prosecution, that is strong evidence, in fact nearly conclusive, that he had probable cause for his action.

Malice.

Malice means either actual malice or any other improper motive. The only proper motive, for instance, of a criminal prosecution is to bring a guilty person to justice, and to use it for any other purpose, *e.g.* as a means of coercing the party prosecuted to pay a debt or to do any other act, whether it is an act which he ought to do or not, is malice in law.

Abuse of process.

727. A person having taken out legal process[15] must not intentionally and knowingly use it or cause it to be used for a purpose for which it was not designed by law. Abuse of process is different from malicious prosecution. In malicious prosecution the whole proceeding is wrongful, but in this case

[15] For the meaning of process, see § 1036.

there may be only a wrongful use of the authority of the court in one particular matter. Thus where the defendants commenced a suit against the plaintiff for a debt which he actually owed them and for which they had a right to sue him, and got a writ of *capias* [16] for his arrest in the suit, which was a regular and proper course of procedure, and then made use of the writ to compel the plaintiff, who was sick in bed and could not have procured bail had he been arrested, by threats of arrest to give up to them property of his to which they had no right, they were held guilty not of a malicious prosecution but of an abuse of legal process.

Publication of slander.

728. A person must not utter slanderous words about another in the hearing of any third person, if he knows or ought to know the facts that make the words slanderous.

Ignorance of the slanderous nature of the words.

If the slanderous nature of the words is not apparent upon their face but depends upon facts of which the speaker has not actual or constructive knowledge, he is not guilty of any breach of this duty; for example, if A reports to B an amusing story which he has heard from C, reasonably supposing it to be a mere fiction and there being nothing in the story apparently applying to D, but in truth it conveys to B, who knows the facts, a slanderous imputation upon D, A is not guilty of any wrong. But if A knew the facts that showed it to refer to D, but through ignorance of the law supposed that such a charge against D was not slanderous, he would not be excused.

Publication of libel.

A person must not do any act with the intention of thereby causing, or probably any act which is negligent as being unreasonably likely to cause, the publication of a libel, if he knows or ought to know its contents and the facts that make it libelous.

Examples of intentional publication of libels are sending a libelous letter to a third person, publishing a newspaper containing, to the publisher's knowledge, a libel, furnishing libelous matter to a newspaper for publication. But a person who merely delivers a sealed letter to another or sells a news-

[16] See § 1037, 1039.

paper which contains a libel does not break this duty unless he knows or ought to know its contents. The publisher of a newspaper, however, is charged with knowledge of its contents and responsible for all libels contained in it.

Newspaper publishers.

Malice

729. It is commonly said that to amount to a breach of duty the publication of a slander or libel must be malicious. But malice in any proper sense of the word is not necessary. The courts have taken great pains to explain that malice in this connection does not mean actual malice but legal malice. It does not in fact imply any state of mind at all. It means merely that the publication is not in the circumstances justificable, *i.e.* that the case does not fall under any of the exceptions to the duty. This is sometimes expressed by saying that malice is implied in law. But that is a mere clumsy and useless fiction. Malice in the proper sense is important in connection with slander and libel in two ways, neither of which relates to the content of the duty, namely: (1) when the publication is actually malicious the jury are permitted to award larger damages than would otherwise be proper; and (2) the presence of malice will sometimes prevent the publication from coming under one of the exceptions to the duty.

When malice is important.

Privileged communications.

730. Exceptions to the above mentioned duties exist in the case of what are called privileged communications.[17] A privileged communication is a publication of matter which is in fact slanderous or libelous, but which the party in the circumstances is permitted to publish. Such communications are divided into absolutely privileged and conditionally privileged communications. The former are those which a person is permitted to make without regard to his state of mind. He is free from legal liability for the publication, even though he makes it knowing it to be false and with a malicious design to injure the person about whom it is made. The latter are privileged only if made with a *bona fide*, though not necessarily a reasonable, belief of their truth and without malice; but they are *prima facie* presumed to be so made, and any one who complains of

Absolute and conditional privilege.

[17] For another meaning of privileged communications see § 1098.

the publication has the burden to prove want of belief and malice.

A communication is not privileged merely because it is a repetition of what some one else has told the publisher, even though in repeating it he refers to the source from which he had it. It is just as wrong to repeat a slander or libel as to originate one. Repetitions of slanders and libels.

Nor is it privileged in general merely because the maker of it believed it, or even reasonably believed it, to be true. A person who publishes defamatory matter about another takes upon himself the risk of its turning out to be untrue. Statements made in good faith.

731. Generally, subject to some qualifications and to a little conflict among the authorities as to details, the following kinds of communications are absolutely privileged, namely: communications between husband and wife, proceedings in legislatures and courts and fair and true reports of such proceedings *e.g.* in newspapers. For such a publication no action of slander or libel will lie. Absolutely privileged communications.

732. A communication is *prima facie* or conditionally privileged when made in the performance of some legal, moral or social duty or to protect some right or interest of the maker. Conditionally privileged communications.

Example of communications made in the discharge of a duty are reports by public officers which they are required by law to make, or a communication by a father to his daughter, whom he is under a moral duty to protect, about the character of a man who is seeking her hand in marriage. But mere friendship between two persons does not create any duty in one to communicate anything to the other. Publishers of newspapers when sued for libel have sometimes attempted to bring themselves under this exception by pleading that they owed a duty to the community to publish the news. But this the courts have always refused to admit. A newspaper proprietor is carrying on a trade for money, is selling news, and is under no other duty to furnish the public with his wares than any other tradesman is. Duty. No duty to publish news.

Interest does not mean necessarily pecuniary interest. Thus the members of a church have an interest in its discipline Interest.

and management, apart from any interest in the church property, so that a complaint to the bishop by a member about the conduct of the pastor may be privileged.

Communications by or between interested parties.

If the person making the communication and the person to whom it is made both have, or only the former has, an interest in the subject to which the communication relates, and the communication is for the protection of that interest, it is *prima facie* privileged. This applies, for instance, to communications between partners about their business, to a memorial addressed to a public officer protesting against the appointment of a person to an office, or to a list printed by a railroad company and distributed to its officers and agents of persons discharged from its employment with the reasons for their discharge, in order to prevent unfit men from getting back into its service, and generally to applications to any one in public or private authority to exercise his authority by a person interested in its exercise, such as information given to the police to enable them to detect or capture a criminal, in which the whole public have an interest, or petitions for redress of grievances.

Communications to interested parties.

The mere fact that the person to whom the communication is made has an interest in it does not generally render it privileged, as where an outsider volunteers information to a master about the character of his servants. But if the interested party asks for the information, it may be given. A common case of this kind is where a person about to employ a servant inquires of a former employer as to the servant's character or behavior while with him. Replies to such questions have often been held privileged. Reports of mercantile agencies made on request to persons having an interest fall under the same principle.

Characters of servants.

Mercantile agencies.

Slander of property or title.

733. A person must not publish false and derogatory statements about another's property or his title to it, in such a manner as would be unlawful in a publication about a person. This is called slander of title or property. This duty corresponds to the right of pecuniary condition, not to any right of reputation, and therefore the breach of the duty does not amount to a wrong unless pecuniary damage results.

The exceptions as to privileged communications apply to this duty also; and there are the further exceptions that a man may in good faith set up a claim to property for himself or one of his family, even though it turns out that he is mistaken and the claim unfounded; and a person may assert that his goods or services which he offers for sale are better than those offered by others. But this does not justify specific false statements about the goods of a rival dealer, for example an assertion that the latter are adulterated.

Privileged communications.

Bona fide claims.

Praise of one's own goods.

V. Statutory Duties.

734. Various duties are imposed by statutes and municipal ordinances, such as duties to put fire escapes on tenement houses, to provide ships with medicine chests, to keep sidewalks free from snow in winter, to have gates and flagmen at railroad crossings, to carry certain lights on vessels at night. It is often very difficult to determine whether the duties created by such statutes are intended to correspond to private rights and to be owed to private persons, so that their breach, if followed by a violation of the corresponding right, will amount to a tort for which the injured party may have a civil action, or whether the duties are owed only to the state, so that their breach is punishable only by a public prosecution. There is no general rule for determining this; it is in each case a question of the intention of the legislature, to be got at by a proper construction of the statute. It has been decided for instance that no private action would lie in favor of a person who fell and was injured because of another's failure to remove ice from the sidewalk in front of his house as required by law, the duty to remove the snow being regarded as a public one. But actions have been sustained for damages caused by the absence of a fire escape when a statute ordered one to be provided.

To whom such duties are owed.

CHAPTER XLIX.

EXCEPTIONS TO DUTIES.

Public authority.

735. Public authority is the ground of certain exceptions to legal duties. A permission from the legislature or from any public authority competent to grant it will justify any act done pursuant to it and all the necessary consequences of such act. But a permission or even a command of a public officer in excess of his authority will not be a protection. Thus the orders of his superior officer will not generally justify a soldier in seizing private property. So it was held in England that where a statute authorized the Queen in certain cases to order churchwardens to enter upon private land used for purposes of burial and do certain acts there, and the Queen by mistake issued such an order in the case of certain land which was in fact not a burial ground, the churchwardens who entered upon the land under the order were trespassers.

Authority strictly construed.

The grant of an authority to do acts which may be injurious is strictly construed against the grantee; it will not justify an interference with the rights of others if it can be executed reasonably without such an interference, and any act done under it must be done in a reasonable and careful manner and due precautions taken, if necessary, against injury to others. Thus if the state authorizes a private person to make a canal, that does not excuse him if in blasting rocks in the course of the work he casts fragments of rock onto adjacent land.

Taking private property for public use.

The constitutions of the United States and of the states forbid the taking of private property for public use without compensation. Any legislative authority in contravention of such a constitutional prohibition is void. These provisions are usually construed to forbid all taking for other than public uses, even though compensation is made; the legislature can not take one man's property from him and give it to another, or compel a

Taking for private use.

man to sell his property to another even for a fair price. Therefore a special tax laid by a state legislature, the proceeds of which were to be used in paying bounties to manufacturers, has been held void and its collection enjoined by the courts. But a tax whose proceeds may be used for proper governmental purposes is not unlawful because the intention of the legislature in imposing it was to benefit particular individuals, for instance a protective tariff. The courts will not inquire into the motives of the legislature in exercising its constitutional powers. In England Parliament, being a sovereign body, may authorize the taking of private property without compensation, but seldom does so. The courts will not construe a statute as having such an operation if it is reasonably capable of any other construction. The right to take property for public uses is called the right of eminent domain. It may be exercised by the state directly, as in the taking of land for highways, or its exercise delegated to private persons, as where railroad companies are authorized, when they can not agree with the owners of land needed for the construction of their roads, to have it condemned by proper legal proceedings and take it *in invitum*.

Powers of Parliament.

Eminent domain.

The taking of property means the direct violation of some property right by the act authorized, not an incidental violation of a property right indirectly caused by it. To make a public highway across a person's land is a taking of the land, although the owner remains in possession; so it is to build an elevated railroad in a street, which violates the easements of light and air of the adjoining proprietors. But a nuisance to property by smoke, smells or noise is not a taking, and the legislature may authorize such a nuisance. Nor is the deterioration in value of property by reason of the construction of some public work, for instance making a railroad along side of it, a taking, that not being a violation of the right of property. In some of the United States the constitutions require compensation to be made when private property is damaged by public works, though not taken. And English statutes authorizing the construction of public works often contain similar provisions.

The meaning of taking.

Authorizing nuisances.

Compensation for damage to property.

The mandate of a court.

736. The mandate of a court ordering an act to be done is generally a protection to persons who act under it. Such a mandate may be:

(1.) Valid, regular and not erroneous; as where in a suit of which it has jurisdiction a court proceeds regularly and gives a correct judgment, and an execution is regularly and in due form issued to enforce the judgment.

(2.) Valid and regular but erroneous, as where, the court having jurisdiction to try the case and proceeding regularly, the jury find a verdict against the evidence or the judge decides a point of law incorrectly, so that judgment is given for the wrong party, and execution is issued on it.

(3.) Valid but irregular; as where a warrant of attachment or arrest is granted in a proper case by a court of competent jurisdiction, but by mistake the security required by law is not taken from the party in whose favor the warrant is issued.

(4.) Void; where the court has no jurisdiction to issue it.

Valid and regular mandates.

A mandate which is valid and regular justifies everything done pursuant to it, no matter what the motive with which it was procured or is executed. This is so, even though it or the judgment or order on which it depends is erroneous and is afterwards reversed or revoked because of the error. If a sheriff arrests a person on a regular and valid warrant or seizes property, the officer and all persons who assist him are justified, even though the action in which the warrant was issued be entirely groundless or the court was induced by fraud and perjury to issue it.

Irregular mandates.

A mandate which is irregular merely is valid, and has the same effect as if it were regular in protecting persons who act under it, until it is vacated or set aside by the court upon a proper application; after which it is the same as if it had been entirely void *ab initio*.[1]

Void mandates.

A void mandate has no effect and protects nobody; all persons who act under it are wrongdoers, except that

Mandate good on its face.

if the mandate is good upon its face, that is, if there is nothing apparent in the document itself to show that it is

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[1] As to the responsibility of the judge in such a case see § 1018.

void, any public officer who in the course of his official duty acts under it in good faith believing it valid, or any one who assists him at his request, is protected by it, though it is in fact void. Thus if a court should give judgment against a person who had not been summoned to appear and had not in fact appeared in the action, the judgment and any execution issued to enforce it would be wholly void. But generally the execution would not contain anything from which the sheriff could know that the party had not appeared, and if he did not in fact know, and proceeded to seize the party's property by virtue of it, he would not be guilty of any wrong. If however a court which had no jurisdiction in criminal cases should try a person for a crime and sentence him to be imprisoned, the warrant of imprisonment, coming from that court, would be on its face invalid, and the keeper of the prison would not be excused for receiving and holding the prisoner under such a warrant. The officer must decide at his own peril whether the mandate is good on its face or not, and is responsible even for an honest mistake. However the person who procures the void warrant to be issued or who gives it to the officer to serve or requests him to serve it, and who therefore is responsible for the officer's acts, or the judge who issues the void warrant, is not protected by it at all, but is guilty of a wrong, even though it is valid on its face.

The officer's responsibility.

Who are protected.

But the mandate of a court only justifies the doing of those acts which it commands to be done. If therefore an officer, having a warrant for the arrest of A or the seizure of his property, takes B or his property instead, he is liable, and it makes no difference that he does so by an innocent mistake and after using the utmost care to find the right person or property.

What acts the mandate justifies.

737. An officer or any other person may not break open the outer door of a dwelling-house to execute the mandate of a court in a civil proceeding, or to arrest a person, even though he has a warrant for his arrest, for one of those minor crimes known as misdemeanors.[2] Every man's house is his castle.

Breaking into a dwelling house.

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[2] See § 1143.

A dwelling house includes a room or suite of rooms or any part of a building that is used as a separate dwelling. But if the officer has once lawfully got within the outer door, he may break an inner door, *e.g.* the door of a room; or if he has begun the execution of the mandate outside, and the person or thing to be taken escapes or is removed into a dwelling house, he may even break the outer door after a statement of his errand, a demand for admittance and a refusal; and so he may to arrest a person on a warrant for treason or felony, which are crimes of a graver nature.

Arrests without warrant; by officers.

738. An officer authorized to make arrests for crime may arrest without a warrant for a crime committed in his presence or on immediate information that a person has committed a crime, or if a felony has actually been committed or the officer reasonably believes that one has been, and the person arrested is the actual perpetrator of the crime or the officer reasonably believes him to be.

By private persons.

A private person may arrest another without a warrant for a breach of the peace[3] committed in his presence, or if a felony has actually been committed, and the person arrested is the one who committed it or the person making the arrest reasonably believes him to be. But the person arrested must be at once handed over to some proper officer.

Defence and protection.

739. Another group of exceptions to duties fall under the head of defence and protection.

Defence of oneself and others.

A person may use force in defence of himself or herself or his or her wife, husband, parent or ascendant in any degree, child or descendant in any degree, master or servant, or of his, her or their possession of property against any one not having a better right to the possession. And a person may hire

Hiring servants for defence.

servants for the express purpose of defending himself or any one whom he may lawfully defend or his property; *e.g.* if workmen strike and attempt or threaten to destroy the employer's property or attack other workmen who have not struck, he may hire as many men as he pleases for their defence.

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[3] See § 1171.

Against what injuries force may be used.

Force may be used only for defence against bodily injuries or injuries to tangible property, not, for instance, to prevent the publication of a slander or libel, the wrongful use of a trademark or an interference with a franchise. Nor will mere words, however insulting or exasperating, justify the use of force against the speaker. Perhaps, however, a person may rightfully be prevented by force from using grossly insulting words to women, or at least to the female members of a man's family, or grossly obscene language in their presence.[4]

Insulting words.

Forcible recaption of property.

740. A person who has a right of present possession of land or a chattel is not guilty of a tort if he takes possession even by force.[5]

Expulsion of an intruder from land.

A wrongful intruder on land may be expelled by force. But if such a person comes peaceably or remains on premises, he can not be expelled by force until he has first been requested to depart and given a reasonable opportunity to do so.

Confusion of goods.

If a person's goods are intermingled with those of another, so that he has a right to take a part of the mass, he is not guilty of any wrong if he peacefully takes temporary possession of the whole for the purpose of making a separation.

Chattels left upon premises.

If chattels are upon the land of a person who has no right to the possession of them, by his consent or by his wrong or fault or the wrong or fault of some person from whom he received them, the owner of them may enter upon the land in a reasonable time and manner and retake them; but not if they are there by the owner's own fault; *e.g.* if a tenant for years quits possession of the land at the end of his term and leaves his goods behind him, he has no right to go back and get them. If they are there by accident without the fault of either party, *e.g.* if A's logs are carried away by a freshet and deposited upon B's land, the authorities are in conflict as to whether the owner has a right to follow them.

Abatement of nuisances.

741. A person who is injured by a nuisance, through the actual or threatened violation by it of his right, may abate the nuisance by force to prevent a further or future injury from

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[4] Cooley on Torts, 167.

[5] He may, however, be guilty of a crime; see § 1174.

it, and for that purpose may enter upon any land where the nuisance is. Thus if A in building his house places one wall of it on B's land, B may tear down the wall; if A builds a dam on his land and thus floods B's land, B may enter upon A's land and remove the dam; if a traveller upon the highway finds a fence built across the road, he may break a passage way through it.

Distraint of cattle damage feasant.

742. If cattle wrongfully come upon a person's land, he may distrain[6] upon them that is, he may seize and hold them as security for getting compensation for the damage done by them. This is called distraint of cattle damage feasant. There are public places called pounds where such cattle may be placed by the distrainer in charge of a public officer, who will retain them for the distrainer or sell them, unless the owner gets them out by paying the damages and pound fees. It is provided by statute that cattle unlawfully at large in the highway may be impounded by any one.

Impounding.

The prevention of crimes and injuries.

743. Any person may interfere by force to prevent the immediate commission of suicide, felony or breach of the peace,[7] or to prevent a lunatic, a drunken man, a young child or an animal from doing serious injury to himself, to another person or to property.

The prevention of calamities.

To save human life or prevent serious injury to human beings, or to avert a great and imminent public calamity or danger, any person may enter upon, use or destroy property. Thus buildings may if necessary be torn down or blown up to stop the spread of a conflagration, and any one may go upon land and use any materials at hand to stop a leak in a levee or sea wall that will cause an inundation if not at once attended to. If a person sees children on a railroad track in front of an approaching train, and after in vain calling to them to come off steps upon the track to get them off, he is not a trespasser.

Lost articles.

Saving of property.

The finder of a lost article may take possession of it to keep for the owner; and in case of any emergency any one may take possession of or interfere with property, unless

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[6] See § 893. [7] See § 1171.

forbidden by the owner, for the preservation of the property itself, *e.g.* may carry goods out of a burning house.

Keeping order in a place.

744. Any one having possession or custody of a place, such as the master of a vessel, an innkeeper, a schoolmaster or a person in his own dwelling house or place of business, may make reasonable rules for the conduct of such persons as he permits to be there, and may enforce such rules, and may also preserve order and protect persons and things present in the place, by forcibly expelling an offender or by interfering forcibly to prevent the commission of an offence. And every lawful assembly or meeting has a similar right, which may be exercised by the officers of the meeting or by any member, *e.g.* a clergyman may expel or direct the expulsion of a person who makes a disturbance in a church during a service.

Only necessary force.

745. In all cases where force is permitted to be used against others or their property for the purpose of defence or protection, no more force may be used and no more damage done than is reasonably necessary. When an intruder is forcibly expelled from a place no unnecessary harm should be done him nor any insult offered him; he should not for instance be kicked out. Under the old common law procedure the plea set up by a person who was sued for using force against another's person was that he gently laid hands on him, *moliter manus imposuit.* Thus it is not usually lawful to kill an animal which is trespassing upon land, because in most cases it will be sufficient to drive it off. But if the creature is doing mischief which can not be stopped except by killing him, he may be killed. The same principle applies to the abatement of a nuisance. If a fence for instance unlawfully obstructs a right of way, no more of the fence should be pulled down than is necessary to secure a passage.

Killing trespassing animals.

Abatement of nuisances.

Apparent necessity.

But necessity in these cases means apparent necessity. A person may be justified in defending himself against an apparent attack upon him, though in fact his assailant had no intention to harm him or was only playing. And allowance must be made for the situation in which the party

is placed. A person who is attacked can not be expected and is not required in the excitement of the moment to use the same cool judgment as to the exact amount of force needful to be used in his defence as the jury might do afterwards.

Necessary force may be used.

As a general rule any amount of force may be used and any damage done that is reasonably necessary for the defence or protection.

Purposes for which force may be used.

The force is justifiable only if used for the purpose of defence or protection, not for the sake of revenge or punishment or, except in the case of distraint, of obtaining compensation for a wrong. If A wrongfully takes B's property or refuses to pay his debt to B, that does not justify B in seizing something else of A's for satisfaction or security. So if B strikes A and then runs away, A must not follow him up and strike him. The wrong or damage against which force is employed must also be a present or immediately impending one. The policy of the law is opposed to a man's being judge in his own cause and undertaking to right his own wrongs; and it only permits him to do so in cases of emergency, when there is not or may not be time to bring the matter before an impartial tribunal. A can not lawfully commit an assault upon B to-day to prevent B from committing one upon him to-morrow, or destroy B's property because it is likely, or even certain, to become a nuisance at some future time.

Only against immediate injury.

Defence of property.

746. It is not, however, lawful, except in defence of one's dwelling house or against an attempted robbery, intentionally to kill or inflict serious injuries upon a human being to prevent the commission of a mere injury to property. A person would not be justified in shooting a chicken thief, or in setting spring guns upon his land to shoot trespassers; though if the trespasser has notice that the spring guns are there, he takes the risk of the danger upon himself and the landowner who sets them is not liable. However, a person may lawfully keep a ferocious dog or other dangerous thing upon his premises for protection against thieves or burglars, and if he has used due care, as by posting up notices, to give warning of the danger, would probably not be liable to a trespasser who was injured by it.

Keeping dangerous things or protection.

747. If a person enters upon another's premises or uses force against another by the latter's permission, and then exceeds his permission or misbehaves himself. the original entry or act is not thereby made wrongful, but only the excess. If for instance a guest in a house gets drunk and assaults the host or his family or breaks the furniture, still his mere presence in the house continues to be rightful until he has been requested to depart. But if the original authority was given by the law and not by the party injured, then any excess or active misconduct invalidates the authority and makes the act wrongful *ab initio;* though a mere omission to do what the party ought to do will not have that effect. Thus any person has a right by the law to enter a common inn, even without the permission of the innkeeper. Therefore if while there he behaves in a disorderly manner, his original entry becomes wholly wrongful, and the innkeeper may sue him as a mere intruder upon his premises. But if having gone in and ordered a meal he refuses to pay for it, that will not make him a wrongdoer *ab initio.* So if an officer lawfully arrests a man and then beats and abuses his prisoner, the arrest is deemed wrongful from the first.

Exceeding a license or authority.

Wrongs *ab initio.*

748. A license or permission from the person to whom the duty is owed will, except in one case to be presently mentioned, excuse any act or omission which would otherwise be a breach of duty; *volenti non fit injuria;* that is, so far as civil liability is concerned, for if the act be a crime, the criminal liability is not taken away. Thus A may authorize B to make a nuisance, which will protect B from any civil action by A. But if the making the nuisance is a crime, B may nevertheless be prosecuted by the proper public authorities and punished for it.

License.

The exception above mentioned is that one person can not legally authorize another to kill him or to inflict a serious bodily injury upon him, or any injury which involves a breach of the peace. Such an act is not only a crime, but the license will not protect the licensee against a civil action for a tort by the licenser. This is on grounds of public policy. Thus if two persons engage by mutual consent in an unlawful prize fight, each may sue the other for injuries received. But an injury may be permitted

What acts can not be licensed.

for some reasonable cause, as in the case of a surgical operation.

Seduction. Other interferences with the body may be licensed. For instance a woman can not, except by virtue of some statute changing the common law, maintain any action against a man for seducing her and having unlawful sexual intercourse with her; and

Athletic sports. injuries inflicted in athletic sports, such as wrestling or foot-ball games, are excused, unless inflicted intentionally or negligently or by some act which was not permitted by the rules of the game and was therefore outside of the implied license.

Express and implied license. A license may be express or implied. Intimacy with a man is evidence of a license to enter his dwelling at proper times and in a proper manner.

License distinguished from easement. A license is a mere permission, an excuse for conduct which would otherwise be wrongful; it creates no property right, but merely a permissive right. It must be distinguished from the grant of an easement, which confers a property right and can not be revoked. It is sometimes difficult to say whether an easement or a mere license exists. It depends upon the intention of the grantor. But an easement in real property can only be created by deed. A permission to use land given in any other manner is necessarily a mere license. Thus the purchaser of a ticket of admission to a theatre is a licensee only; he has no easement to use the theatre, and the proprietor of the theatre may expel him at his pleasure.

Revocation of a license. **749.** A license may be revoked at any time. And this is so, even though it has been paid for, the licenser has contracted not to revoke it,[8] and the licensee has on the strength of it expended money or put himself into a position where he will suffer loss by its revocation. Thus if A for a valuable consideration paid by B licenses B to flow his land for a mill pond, and B relying upon the permission spends money in erecting a dam and a mill which will be entirely useless without the pond, A may at any time revoke the license and compel B to remove his dam.

Estoppel in equity. Such at least is the doctrine at law. But lately the courts of equity have shown a disposition to forbid the revocation of a

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[8] But in this case the licenser may be liable for a breach of his contract if he does revoke it.

license, which the licensee has paid for and acted upon on the faith of its being continued, with the knowledge and consent of the licenser, and in such a manner as to be subjected to serious loss by its revocation; and on this subject the rules of equity seem to be still in a formative and unsettled state

A licensee coupled with an interest.

But a "license coupled with an interest" can not be revoked. That is, if a property right is granted and a license with it for the purpose of making it available, the license is irrevocable; as if A sells to B a chattel which is on the seller's premises and licenses B to enter and take it.

Effect of revocation.

The revocation of a license does not make wrongful any act done under it before the revocation; it is not equivalent to the rescission of a juristic act which makes it invalid *ab initio*. But if pursuant to the license a nuisance has been created, although the subsequent revocation of the license will not render the creation of the nuisance wrongful, its farther continuance may be.

Exceptions as to possession.

750. Important exceptions to duties are allowed in favor of *bona fide* possessors.

Bona fide reception of possession.

A person is usually justified in receiving possession of a thing from another who has possession with an apparent right to transfer it, and whom he in good faith, and perhaps also reasonably, believes to have such a right. But when a person buys a thing from one who has no right sell it, the authorities conflict as to whether he does wrong in taking possession of the thing bought. Possession so obtained is rightful but precarious; the right, which is a mere permissive one, may be put an end to by a demand of possession by the person entitled to it. It has been thought that if the party so acquiring possession also in good faith and reasonably supposes himself to have acquired a right of use, he is justified in exercising such supposed right of use in any way not involving injury to the thing; but probably that is not the law. He has not the right to transfer the possession and his supposed right to another. Thus if A steals B's goods and sells them to C, who buys in good faith supposing A to be the owner, C according to some authorities is not guilty of any wrong by merely taking the goods and keeping them in his possession; and all the

Using the thing received.

The re-transfer of the possession.

authorities agree that he would not be guilty of any wrong if the thief had merely lent them to him or deposited them with him for safe keeping. Perhaps he may also use them, but probably not. But if he injures or destroys them, or sells and delivers them to another person, he is undoubtedly guilty of a wrong.

Doing work on a thing for the possessor.

It is doubtful whether a person who is employed to do work upon a thing by a person who has possession and an apparent right to have the work done, and does such work in good faith, is liable to the true owner; *e.g.* whether, if A ousts B from his house and then employs carpenters to alter the house, or tortiously gets possession of B's cotton and has it spun into thread, the carpenters or spinners are guilty of any wrong.

Possession of a place or receptacle.

751. A person who has a right to take or keep possession of a place or receptacle does not commit any breach of duty merely because in doing so he takes or keeps possession of things of another contained in it. Thus if a tenant of land goes out at the end of his term and leaves his chattels behind him, a new tenant who comes in and lets the chattels remain there is not liable to their owner, even though the latter has no right to enter and take them and the tenant refuses to permit him to do so, so that he is unable in any way to get his goods.

Inability and inconvenience.

752. Inability and inconvenience as grounds of exceptions to duties are next to be considered.

Impossibility.

The fact that it is impossible for a person to do an act will generally excuse him from a peremptory duty to do it; but not if he has voluntarily assumed the duty, as by contract, or has become subject to it by his own wrong. It will always excuse him if the duty is only to use due care. Thus if a person by his wrongful act creates a nuisance on another's land, he is not excused from his peremptory duty to abate it by the fact that he is physically or pecuniarily unable to do so or that he has no right to enter upon the land where it is in order to abate it and the owner of the land will not permit him to do so. But the master of a ship, who is bound to use due care to carry and deliver his cargo promptly, is not liable if his ship is detained against his will by an embargo or in quarantine.

Inconvenience or expense.

A person is not excused from the performance of a duty because it would be very inconvenient or expensive for him to

perform it, or because the advantage to him or to others or the public from non-performance would outweigh the advantages of performance; except so far as, the duty being one to use due care, such considerations come in to affect the reasonableness of the risk. Thus a person building on his own land may not even temporarily deposit building materials upon his neighbor's land, and if a person has a ruinous and unsafe wall standing by the side of the highway and making the use of the highway dangerous, he must repair or remove it no matter how great the expense of doing so. But in determining what precautions a railroad company ought to take for its passengers' safety expense may be taken into consideration. Collateral benefits.

753. There remain a few miscellaneous exceptions. Trifling interferences with another's person or property, done without any intention of causing actual damage and not unreasonably likely to cause it, not done with the intention of asserting a right or gaining one by prescription or in a hostile or insulting manner or in pursuit of a purpose otherwise unlawful, if the actor reasonably believes that the person having the right would not object, and no actual damage in fact results, are not unlawful; *e.g.* gently touching another to attract his attention, or picking up a book belonging to another to look at it. Trifling interferences with others.

Coercion by third persons will not generally excuse a breach of duty. It has been held that where a person, compelled by the threats of twelve armed men which put him in fear of his life, entered another's close and took a horse, he was guilty of a tort. Coercion.

Where no right of support is violated, a person may excavate on his own land or make any change in his own land, even though he thereby causes another's land to cave in or another's building to fall, provided the damage is not due to the negligent or unskilful manner in which he does the work; but he should use due care to give notice of what he is about to do to the person whose property is endangered so that the latter may be enabled to take precautions. Thus if A rests his house on B's wall, and has no right of support B may tear down the wall and so cause A's house to fall. Excavations etc. on land.

C. RIGHTS IN PERSONAM AND THEIR CORRESPONDING DUTIES.

CHAPTER L.

OBLIGATIONS.

Contents of obligations.

754. The contents of obligations do not consist, like those of rights *in rem*, of a limited number of well defined states of fact, but are usually determined by the will of the parties who create the obligation, and can not in most cases be otherwise defined than as the state of facts that will arise from the performance of the obligation duty. The duty also can not generally be separated from the right, but is usually defined by actual consequences which are the same as, or the negative of, the facts which form the content of the right, so that there can be no breach of the duty without a violation of the right. Therefore the rights and duties, having their origin in the same facts and covering the same ground, are most conveniently treated of together. The party subject to the duty is called the obligor; the party to whom it is owed, the obligee.

Connection of the duty and the right.

Parties.

Classes of obligations.

Obligations may arise, and may be classified according to their origin, in the following ways.

By direct act of the state.

Obligations by statute.

755. Obligations are sometimes created by the direct act of the sovereign power. These may be imposed directly by statute, as when the legislature creates a new township or county out of part of an old one, and charges upon the new corporation its proportion of the debts of the old. But the most common sources of this kind of obligations are the judgments and decrees of courts, the effect of which is generally to create obligations.

Judgments and decrees.

Obligations from agreement.

756. Obligations can originate from the agreement of the parties. The most important of these are contract obligations. Of contracts enough has been said elsewhere; they always give rise to obligations. Obligations may also be created by agreements other than contracts

757. A gift in trust is where one person, called the donor or creator of the trust, conveys to another, called the trustee, some right, with directions to him to hold or exercise it in a certain way for the benefit of a third person, called the *cestui que* trust; as for instance if A gives a sum of money to B and directs him to invest it and pay the income to C. Here an obligation arises in favor of C against B to use the money in that way and no otherwise. Regularly there are three parties to a gift in trust, but the donor and the *cestui que* trust may be the same person, that is, a man may create a trust for himself; and when there is more than one *cestui que* trust, the trustee himself may be one of them, *e.g.* a man may by his will leave land or money to one of his sons in trust to receive the rent or income and divide it between himself and his brothers and sisters. This sort of obligations were unknown to the common law, and are still entirely void at law. The courts of law recognize only the rights of the trustee, treating him as the absolute owner. But the courts of equity enforce the obligation in favor of the *cestui que* trust.

Gifts in trust.

Parties.

These obligations are equitable.

A declaration of trust is where a person, having already a right which might be the subject matter of a gift in trust, instead of transferring it to another person to hold for the *cestui que* trust, consents and declares that he holds it in that way himself. If A having property in his hands desires to create a trust obligation in favor of C, he may do so by transferring it to B as trustee for C. But there is no reason why, if he chooses, he should not himself become trustee, without being obliged to call in the aid of B, and this he is permitted to do. To a transaction of this kind there are only two parties, the donor and the trustee being the same person. Obligations created in this way are also merely equitable. An equitable assignment[1] is a species of declaration of trust.

Declarations of trust.

Parties.

These obligations are equitable.

The intention to create an obligation by a conveyance in trust or a declaration of trust, like an intention to make a contract, may be express or implied; and if the latter, may be

Express and implied obligations.

[1] See § 269.

implied in fact or in law. The subject of implied trusts will be considered in the next chapter.

Obligations from receiving benefits.

758. Obligations may arise from the reception of benefits. The reception may voluntary or involuntary. When a service is rendered with the expectation on the part of the renderer that it is to be paid for by the person to whom it is rendered, and is accepted voluntarily by the latter when he knows or ought to know that such an expectation exists, an obligation arises at common law from the recepient to the renderer to pay at once a reasonable compensation for the services. Thus if A orders goods of B, and B sends goods different from what were ordered, A may refuse to accept them; but if he does accept them he must pay for them.

Voluntary acceptance of services.

Services rendered under a contract.

Generally there is also a contract between the parties for payment. Unless the services are rendered in performance of an already existing contract, the rendering and acceptance of the services will usually amount to an implied contract,[2] which will create a true contract obligation. But when services are rendered in performance of an existing contract to render them, the performance does not give rise to another contract. Thus if A hires B to work for him expressly agreeing to pay him for it, the doing of the work will not raise a true implied contract in B's favor for his pay, the express contract being sufficient. But the fact that the services are rendered and accepted under a contract, so that there is also a contract obligation to pay for them, will not prevent the non-contractual obligation now under consideration from arising, unless the contract is under seal. Therefore when under a contract of sale or of hiring of labor the contract has been performed by the seller or the person hired, there may be two distinct and separate obligations to pay the price, one arising from the contract and one from the acceptance of the services. If the contractual and non-contractual obligations differ, the contract governs. For example, though the non-contractual obligation is usually to pay a reasonable compensation at once, yet it will not be so if the contract fixes a price or a time of payment. If the contract is void or is

Conflict between the contract and the non-contractual obligation.

Void contract.

[2] See § 374.

rescinded, and thus becomes as though it had never been, the non-contractual obligation may still exist. Thus if a servant has been hired for a fixed time and is wrongfully discharged before the end of the time, he may, if he chooses, treat the contract of hiring as having been rescinded by mutual consent and sue on a *quantum meruit*[3] for payment for what he has actually done, the obligation arising from the acceptance of his services. But an obligation of this sort will not be permitted to be raised by the performance of an illegal contract, *e.g.* a contract to commit a crime or a usurious loan. By a technical rule of the common law if the original contract is by specialty no non-contractual obligation can arise from its performance, there is a contract obligation only.

Illegal contract.

Specialty contract.

759. A person who intentionally and voluntarily makes use of something of another's for his own benefit must at once pay the other a reasonable compensation for the use. Thus it has been decided that if an apprentice is enticed away from his master, the master may sue the enticer in an action based on this obligation for the value of his services. And if a lessee of land enters before his term begins, he must pay rent from the time of his entry. But when an interference with property amounts to an actionable tort, so that full compensation can be had in an action for the wrong, the authorities leave it still unsettled whether any obligation of this kind arises; for instance if A wrongfully takes B's property, it is doubtful whether B can sue on an obligation to pay the value of it.

Using something of another's.

When the use is tortious.

760. When benefits are involuntarily received at another's expense an obligation will in some cases exist to make compensation. These obligations have been very aptly named meritorious obligations.[4] The civil law inclines to recognize such obligations whenever one person has performed services for another in such circumstances that the latter ought in justice to pay him for them, but there is no contract or agreement to do so. Thus a person who in a proper case interferes and manages the affairs of another without any authority from the latter but for the latter's benefit, not merely out of kindness but with a view to being

Meritorious obligations.

In the civil law.

Negotiorum gestor.

[3] See § 372. [4] Holland, Jurisprudence, 164, 169.

paid for his services, is called *negotiorum gestor*, and in certain cases is entitled to compensation; as if for instance a person's fence should be accidentally thrown down while he was absent on a journey, so that cattle were getting in and destroying his crops, and a neighbor should rebuild the fence.

In equity and the maritime law.

In equity and in the maritime law, which have drawn many of their principles from civil law sources, meritorious obligations are admitted with some freedom. Equitable obligations of this sort fall under the head of implied and constructive trusts. They and obligations arising under the maritime law will be treated of in future chapters.

At common law.

But the common law does not favor meritorious obligations, and as a general rule adheres pretty strictly to the principle that an obligation shall not be cast upon a man except by his own consent or default. Ordinarily if one person interferes unsolicited in another's affairs and does the latter a service, however important or necessary, he has no legal right to compensation. Such obligations are mostly confined to cases where the obligee has been compelled to do some act or make some sacrifice which properly belonged to the obligor, or the latter was under a duty of some kind to do acts which the interest of the public required should be done at once, and the obligee has reasonably intervened and done them for him. Thus if one of two partners makes a promissory note in the firm name and uses it to discharge his private debt, and the other partner is compelled to pay it, the latter may recover the amount from the former. And where A wrongfully put his pig into B's pen and left it there, and the law forbade B to turn it loose, it was held that B ought not to let it suffer for want of necessary food and care, and that he had a right to compensation from A for the cost of keeping it. It has been decided that a person who buries a dead body may have a right to be reimbursed for the expense of doing so by the family or personal representative of the deceased.

Contribution and indemnification.

The rights of sureties against each other for contribution and against their principal for indemnification[5] are non-contructual

[5] See § 396.

obligations of this sort, though there may also be contracts to the same effect.

No contribution among wrongdoers.

But there is no right of contribution among wrongdoers. If a number of persons have committed a joint tort, and one of them is forced to pay damages to the injured party, he can not call upon the others to bear their shares. This depends upon the principle already mentioned in connection with unlawful agreements, that the law will not assist a wrongdoer.

Quasi-contracts.

Obligations from the reception of benefits, so far as they are enforceable in the courts of common law, are included among those which, as has been already explained,[6] are considered as arising from fictitious or *quasi* contracts. But that they are really non-contractual obligations is apparent from the fact not only that there may be actually no contract, but that they existed and were enforced at common law at a time when actual contracts to pay the money would not have been enforceable.[7]

Obligations from holding something.

761. Obligations may spring from holding something of another's. A persons who has in his hands a fund belonging to another[8] must, unless by contract or otherwise he has some special right to keep it, pay it to that other without demand.[9] An obligation of this sort arises whenever one person gets possession of another's money, either rightfully or wrongfully, without any right to retain it, as by finding or stealing it, or where money is paid to a person by mistake of fact,[10] on a consideration that wholly fails,[11] or pursuant to a contract that is afterwards rescinded for fraud or duress, or is paid to one person to be by him paid over to another, as to an agent for his principal.

Holding a fund.

Money paid on an illegal contract.

When money is paid under an illegal contract there is usually no obligation to repay it, although the contract is void and the payee refuses to perform his part and so keeps the

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6 See § 375. 7 See § 766. 8 See § 219.

9 Even if it is nominally payable on demand, no demand is in fact necessary. See § 372.

10 See § 326. 11 See § 380.

money without making any return for it, because of the principle that the law will not help either party to an illegal transaction.

Money payable because of an illegal contract.

But if the money is not paid directly under the contract, but the illegal contract is merely the occasion or indirect cause of its being paid, there may be an obligation of this kind to pay it over. Thus if money is deposited with a stakeholder on an illegal wager, the depositor may demand it back, either before or after the happening of the event which was to decide the wager, unless before such demand it has been actually paid over to the winner. Here the contract of deposit is legal, and the unlawful wager is merely the occasion of making it; while the wager, though invalid as a contract, is effectual as a license to the stakeholder to pay to the winner. But if there had been no stakeholder, the winner could not have recovered the amount of the wager from the loser, since such recovery must have been directly on the illegal contract; nor could the loser after paying to the winner recover back the money from the latter. So where an insurance company appointed a general agent to act for it in a state where it was forbidden by statute to carry on business, it was held that the agent was nevertheless bound to pay over to the company the premiums which he received for it from policy holders. On payment to him the money became a fund in his hands, which, if it had been a chattel, would have been the property of the company, so that the latter had a *quasi* ownership in the fund.

Transactions equivalent to the receipt of money.

762. Any transaction that is equivalent to the receipt of money may have the same effect of creating or leaving in one person's hands a fund which properly belongs to another, and which accordingly the holder will be bound to pay over.

Credit in account.

Credit in account is usually equivalent to money. Thus where an agent whose duty it was to receive money from his principal and pay it to a creditor of the latter, without actually receiving any money charged the principal with the sum on making up his accounts and settled with the principal on that basis, it was held that the agent was personally liable to the creditor for the amount.

Assumption of a mortgage.

So if land is sold on which there is a mortgage, and the buyer contracts with the seller to assume and pay the mortgage, and on that account the amount due on the

mortgage is deducted from the price, it has been decided that the buyer is directly responsible to the mortgagee for that sum. The contract between the seller and the buyer would not directly confer any right on the mortgagee who was not a party to it, but the effect of the whole transaction was to leave a fund in the buyer's hands for the mortgagee.

Account stated.

When two persons who have had dealings together settle their accounts and agree that a balance is due from one to the other, that agreed balance is a fund belonging to the latter, and an obligation to pay it at once arises. This is called an account stated. The assent of an executor to a legacy is equivalent to this, and creates an obligation in favor of the legatee.[12]

Quasi-contracts.

Obligations from holding funds as above described are also deemed in the common law courts to be based upon contracts of a fictitious nature implied in law.

Obligations created by a grant.

763. An obligation of this kind may also be created by a deed of grant. If A grants to B a sum of money but does not pay over the money to him, that is equivalent to the creation and transfer of a fund. The ownership of the fund has been granted to B, but the possession of it remains with A, who accordingly comes under an obligation to pay it to B. A grant of an annuity is an example of this.[13]

Obligations from holding rights.

764. A person who holds a right which can only be transferred by a formal juristic act, and who, assuming the juristic act by which he acquired it to have been merely equivalent to the transfer to him of the possession of a chattel, would in the circumstances be under a duty to give up the possession of the chattel to some other person,[14] is bound to transfer or release the right to such person by a proper juristic act. There may be connected with an obligation of this kind accessory obligations as to the surrender or cancellation of documents. For example, if A by fraud induces B to sell and deliver to him a chattel, although A becomes the owner of the chattel, yet B on discovering the fraud can by his own act rescind the sale and by so doing put an end to A's ownership and revest

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12 See § 669.

13 Langdell, Summary of Contracts § 100.

14 See § 800.

the title in himself, and A, being then in the situation of having B's chattel in his hands without any right to it, will come under a duty to restore the possession to him. But if by the fraud B is led to sell his land to A and convey it to A by deed, the mere rescission of the contract will not revest the title to the land in B. Land can only be conveyed by deed, and having been once so conveyed the title remains in the grantee until devested by some equally formal act. A therefore comes under an obligation to make a formal reconveyance to B.

These obligations are equitable.

This obligation is equitable, the courts of law not being able to make a decree for a reconveyance.

Other holdings of rights.

There are also certain other cases where persons who have acquired rights, whether by a formal or a formless juristic act, become subject to equitable obligations to hold or use those rights for the benefit of others without any agreement on their part to that effect. These are all cases of what are known as implied or constructive trusts, and will be considered in the next chapter.

Obligations from *quasi* wrongs.

765. Obligations arise from doing *quasi* wrongful acts. Those acts are certain kinds of conduct which the law desires to prevent or discourage, and yet for some reason it is not thought best to treat them as crimes. Therefore the end is sought to be attained by imposing upon the doer an onerous obligation in the form of

Penalties.

a pecuniary penalty. Thus it is sometimes provided by statute that a ship entering a certain harbor shall either take a pilot or pay a penalty, or that any one practising medicine without a license shall be subject to a penalty. The acts and omissions on which such penalties are imposed are not crimes, and the penalty is not, like an ordinary fine, exacted by means of a criminal prosecution.

Penalties payable to particular persons.

Sometimes it is made payable to a particular person, usually one whose interests are supposed to be prejudiced by the conduct, or to some charitable corporation. Thus a penalty for the unauthorized practice of medicine may be made payable to the county medical society. In that case there arises at once on the doing of the forbidden act an obligation to pay the penalty to the person entitled to it. This is a debt, which may be enforced in an

Common informers.

ordinary civil action like any other debt. In other cases any person who pleases may sue for the penalty and recover it for his own benefit or partly for his own benefit. A person who thus sues for

a penalty is called a common informer. In this case there is no debt, no obligation to pay the penalty to a specific person, until judgment is obtained for it; *i.e.* there is no obligation in existence at the commencement of the action; so that the action is one of an anomalous character, partaking of the nature of a criminal prosecution, though brought by a private person in the form of an action for a debt. It is called a penal action. Penal actions

766. A debt is a legal obligation to pay a fixed or liquidated sum of money, or one whose amount can be ascertained by computation or by the application of some rule or standard; *id certum est quod certum reddi potest.* It is contrasted with an uncertain or unliquidated claim, such as a claim for damages for a tort. An obligation to pay the reasonable value of goods purchased or of labor performed is a debt, since in theory of law there can be but one reasonable value, which is capable of being known. The sum to be paid is also called a debt. The common law conception of a debt seems to be that of a sum of money, or unembodied fund,[15] belonging to the creditor but temporarily in the possession of the debtor,[16] so that the duty to pay a debt is analogous to that of the possessor of a chattel to restore it to the owner.[17] Debts. Common law theory of debts.

Debts are divided into specialty debts and simple contract debts. The former are created by record, *i.e.* by a recognizance or judgment, or by deed.[18] The latter name is a misnomer, since a so called simple contract debt need not arise by a true contract at all, and at common law could not so arise. At common law a debt could be created only by a specialty or by the debtor's receiving from the creditor some service for which he ought to pay or getting into his hands a fund belonging to the creditor, in which last cases the obligation was not truely *ex contractu.* If a simple contract had been fully performed on one side and nothing remained but the payment of money on the other side, *e.g.* if A had worked for B or sold him goods for which B had agreed to pay him, there would indeed be a debt; but the source of the obligation was not the promise but the Specialty and simple contract debts.

15 See § 219, 382.

16 Langdell, Summary of Contracts, § 100.

17 See § 800. 18 See § 876, 877.

performance. On the other hand a simple contract to pay a fixed sum of money, so long as the consideration remained executory, did not create a debt, even though by the terms of the contract the money was payable before the performance of the consideration; *e.g.* if A had contracted with B to do work for him for a price to be paid in advance, and B had contracted to pay the price, the price would not constitute a debt. In fact at common law such contracts could not be enforced at all.[19] At present, however, any binding contract to pay a fixed sum of money creates a debt.

Interest.

767. Interest is a price paid by a debtor for being allowed to delay the payment of his debt. In former times interest was called usury, and for many centuries the taking of it was regarded by the church as a sin. In most places the maximum rate of interest that may be taken is fixed by law, and usury is now distinguished from interest and means a rate of interest higher than is allowed by law, illegal interest. A loan at usurious interest is an illegal contract and wholly void, and the lender can not, except where the general rule has been changed by statute, recover even the principal of the loan. But the usury laws do not apply if the repayment of the principal is subject to a contingency.[20] For instance if a person should borrow money to be repaid only out of the profits of a business adventure which might yield no profits, any rate of interest might be contracted for. Usury laws are generally condemned by economists as unjust, and the courts of equity take that view of them; so that, although those courts can not, any more than courts of law, directly decree the payment of a usurious loan in the teeth of the statute, yet if the borrower on his part has occasion to resort to a court of equity for any relief, *e.g.* to compel the lender to restore anything which may have been pledged or mortgaged to secure the debt, the court will only assist him upon condition that he pay to the lender the principal with legal interest, upon the principle that he who seeks equity must do equity.[21] In every place, even where there are no laws against usury, a certain

Usury.

Relief in equity against the usury laws.

Legal interest.

[19] See § 923.

[20] See § 830.

[21] See § 944.

rate of interest is fixed by law, which is called legal interest, as the rate to be paid when no other rate is determined by agreement.

Interest only payable by agreement.

Interest is not payable upon any debt created by the agreement of the parties, *e.g.* upon a loan of money or the price of goods sold on credit, unless actually contracted for. There is no implied contract for it; the presumption is that a debt does not bear interest.[22]

Discharge of obligations.

768. Obligations may discharged in various ways, and first by the agreement of the parties. The obligee may release the obligor in whole or in part from the obligation. A technical release can only be by deed. It requires no consideration; though a gratuitous release, being in the nature of a gift, may be invalid as to creditors of the releasor like other gifts. A release of one joint debtor or co-surety releases all the others, and a release of a principal releases his surety; because otherwise if the other joint debtor or the surety were forced to pay, he might sue the releasee for contribution or reimbursement, and thus the effect of the release would be wholly or partly destroyed. But the rule is otherwise if the release expressly reserves the rights of the creditor against the other parties, for in that case the releasee consents to take the release subject to the risk of being called upon to contribute or make reimbursement.

Release.

Release of a joint debtor or principal.

Covenant not to sue.

A covenant by a creditor with his debtor not to sue him for the debt is not technically a release. But since, if the creditor should sue, the debtor could then in turn sue him for a breach of his covenant and recover back the same sum which the creditor had just recovered from him, so that the net result of the two actions would be nothing, the covenant is allowed to have directly the force of a release in order to prevent the bringing of two useless actions or, as it is called, circuity of action.

Discharge or variation by agreement.

Obligations by specialty

769. Very similar to a release is an agreement by the parties to an obligation to discharge or vary it. If the obligation was created by a specialty, it can at law be discharged or varied only by specialty. An unsealed agreement to that effect, even though in writing, has at law no operation upon the original obligation, though it may itself be a valid contract for whose

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[22] As to interest awarded by way of damages, see § 896.

breach an action will lie. Thus if A is indebted to B by a bond, and the parties make a parol agreement on a valuable consideration to discharge the bond or change the manner of performance, that is no defence at law in an action by B against A to enforce the original terms of the bond. But if such a suit by B is a breach of the parol contract, A may sue him in turn for damages. Equity, however, following its general principle of disregarding mere form and attending only to the substance of transactions, when a contract has been made on a valuable consideration purporting to discharge or vary a specialty obligation, will interfere by an injunction and prevent the enforcement of the specialty contrary to the contract.

Discharge in equity.

Obligations not arising from specialties may be discharged or varied by the agreement of the parties. For the mere discharge of such an obligation writing is not required, even though the obligation had its origin in a written agreement that is, a written contract may be rescinded or discharged by an oral agreement. But if an obligation is to be varied and not simply discharged, or a new one to be substituted for it on its rescission, the same requirements of form must be observed as at the creation of an entirely new obligation; for example if the agreement is within the statute of frauds, writing must be used. So at least is the weight of authority. But a mere waiver by one party of some of his rights, *e.g.* an extension of the time for performance, is not regarded as an alteration of the contract. It amounts to a license which will excuse non-performance until it is revoked. A person may license another to do something which without the license would be a breach of an obligation-duty as well as of any other duty.[23]

Discharge of non-specialty obligations.

Waiver.

As to consideration, if a bilateral simple contract under which something still remains to be done on both sides is rescinded, no new consideration is necessary. Just as in the making of a bilateral contract each promise is a consideration for the other, so in its unmaking the giving up by one party of what is due him is a consideration for the like relinquishment

Consideration for discharge.

[23] See § 748.

by the other. But a strictly unilateral obligation, including the case where a bilateral contract has been fully performed on one side, can not be discharged by mere agreement without a consideration. Bills of exchange and promissory notes however come in this respect, as in most others, under the rules of the law merchant and not of the common law, and, at least in England, may be discharged by a parol agreement without consideration. But in the United States the common law rule is followed, and a consideration is necessary.

Discharge of negotiable instruments.

770. When an existing obligation is discharged by agreement and by the same agreement a new one is created in its place, each part of the transaction is a sufficient consideration for the other part, the discharge for the new undertaking and *e converso*. Thus if A owed B $100, they might agree that the debt should be discharged and that A should be bound to deliver to B a horse or to perform services for B in lieu of the money. This is called in the civil law *novatio;* but in the common law the name novation is usually confined to cases where there is some change in the parties, as for example if A owes B $1000 and B owes the same sum to C, and the three parties agree that the two debts shall be discharged and A shall become debtor directly to C for the amount. When one partner retires from a firm and a new partner comes in, there may be, if the creditors consent, a novation of the debts of the old firm, the retiring partner being discharged and the incoming one assuming a liability for them.

Novation.

771. Performance of an obligation according to its tenor discharges the obligation. There was a real or apparent exception to this at common law in the case of certain specialty debts, which will be explained hereafter.[24]

Performance.

When a new obligation is given for an existing debt, whether that is a payment of the debt is wholly a question of the intention of the parties. They are at liberty to make whichever arrangement they please. But the *prima facie* presumption is that the new obligation is not intended to discharge the old one, but that the two are to exist side by side. Thus if a bill of exchange or promissory note is given for a pre-existing debt,

Concurrent obligations.

[24] See § 887.

it will not be presumed to have been given as payment of the debt but merely as further security for it, though no action can be brought on the debt before the bill or note comes due; so that if payment is not duly made, the creditor may usually sue either on the original debt or on the bill or note at his pleasure. If the debtor asserts that the bill or note was taken in payment and that the original debt is extinguished, the burden is on him to prove that such was the intention. But

Merger. if one obligation is by specialty and the other one is not, then a different rule prevails; the non-specialty obligation is merged in the specialty and ceases to have any independent existence, whether the parties so intend or not. Thus if a bond is given for a pre-existing simple contract debt, the original debt merges in the bond, and the creditor can have an action only on the bond. Specialty obligations are deemed to be of a higher nature than other obligations, and, just as in the case of estates, when a greater and a less right meet in the same person the greater swallows up the less.

Tender of goods. **772.** An obligation to deliver goods is completely performed by a tender of them, even though the obligee to whom they are tendered refuses to receive them. But if the goods are the property of the obligee, and the obligor, after a refusal by the owner to receive them, chooses to retain them in his possession, he remains under an obligation to deliver

Tender of money. them on demand.[25] An obligation to pay money, however, is not discharged by a tender of it, unless the tender be properly followed up, which means that the obligor must be always ready (*toujours prist, uncore prist*) to pay on demand, and if he is sued for the money, he must pay it into court for the obligee. If he does so, he is freed from his obligation and recovers the costs of the suit; otherwise his tender avails him

Time of tender. nothing. A tender must be made at the time when the performance is due, neither before nor after. But by statute at present in some cases a tender made afterwards is a good defence

Amount to be tendered. to an action on the obligation. A tender of more than is due is not good if the obligee is required to make change or perhaps

[25] See § 800, 808.

even to pick out what is due him; but it is good if he is allowed to keep the whole. A tender of money must be of legal tender money; but if anything which is commonly accepted as money is tendered, such as a check or bank bills, it is good unless specially objected to on the ground of its not being legal tender. What kind of money is legal tender is determined by statute, in the United States by national statutes.

Legal tender money.

773. If a debtor owes two or more debts to the same creditor all of which are due and payable, and pays him a sum of money not sufficient to discharge them all, the debtor may appropriate the payment to whichever of the debts he pleases. If he does not do so, the creditor has the right to appropriate, and may even apply the money to a debt which has been barred by the statute of limitations[26] and thus reduced to the condition of an imperfect obligation. If neither party makes any appropriation, the law will appropriate the payment, generally to the oldest debt.

Appropriation of payments.

774. If an obligation was valid at its inception but performance afterwards becomes unlawful, the obligation is discharged. If the act to be done is from the first impossible of performance, no obligation ever arises. A contract to do an impossible act is void. But if it becomes impossible afterwards, the rule is that it the law casts a duty upon a man, and he is disabled from performiug it without his fault, the law will excuse him, but if ne assumes it by his own contract, he remains legally bound to perform it, because he might have guarded himself by inserting proper stipulations in his contract. There are certain apparent exceptions to this rule, which rest on the theory of an implied condition, for example that a contract whose performance depends upon the existence of a specific thing, such as a contract to repair a ship, is construed to be conditional upon its continued existence, or a contract for personal services upon the life of the person who is to render them, so that if the thing ceases to exist or the person dies the contract need not be performed.

Performance unlawful.

Impossibility of performance.

Duties imposed by law and by contract.

Implied conditions.

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[26] See § 888.

Breach of an obligation.

775. The breach of an obligation does not necessarily put an end to its existence. Upon a breach a right of action arises in favor of the obligee against the obligor, which right at common law is probably not itself an obligation. But the original obligation continues to subsist by the side of the new right of action, so far as it is still capable of being performed. Of course if an obligation is performable at or within a certain time it can not be exactly performed after that time. But it may still be capable of substantial performance, and may exist in a modified form. A debt for instance may be paid after it is due, and no doubt until payment retains its character of a primary obligation to pay money.[27]

But where the obligation is of such a nature that it can not be performed after it has once been broken, as in case of a contract to deliver goods on board of a steamer before she sails or a contract not to do a particular act, then the obligation will be destroyed by a breach and nothing will remain but the right of action. And even when the original obligation does survive, it is so intimately connected with the right of action that it can be discharged only at the same time with the latter right and in the same way. How this may be done will be explained elsewhere.[28]

Equitable liens.

776. Equitable liens or charges upon property are not strictly obligations, though often so called. They are facultative rights, and differ from obligations in that they have no duties corresponding to them. They are, it is true, usually created to secure the performance of duties, but those duties correspond to other rights. Thus if A owes B $1000 and gives B an equitable lien on his property to secure the payment, the duty to pay corresponds to B's right as creditor, not to the lien, as is plain from the fact that that duty and right, *i.e.* the debt, would equally exist if there were no lien for security An equitable lien is a right in *personam*[29] in the nature of a hypothecation, that is, a right to have the property sold by the court and the proceeds applied to satisfy some claim of the lien-holder. It is a purely equitable right, not enforceable in a court of

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[27] See § 887. [28] See § 887. [29] See § 887 *et seq.*

law. Such a right may arise in any way in which an equitable obligation may; and also any one having a power of disposing of property may usually create an equitable lien on it. Thus the owner of property, who might mortgage it, may instead of doing so hypothecate it by the grant of an equitable lien, or, as he might dispose of it to any one by his will, he may in the same way charge it with an equitable lien for any one's benefit, as where a testator charges his real property with the payment of his debts.[30] How created.

777. Two very important kinds of equitable liens are vendors' liens and equitable mortgages by the deposit of title deeds.

If land is sold and conveyed to the buyer but the price is not paid, the seller or vendor, unless there is some agreement between the parties to the contrary, has an equitable lien known as a vendor's lien, upon the land to secure the payment of the price Vendors' liens.

A person may make an equitable mortgage of his land to secure the payment of a debt by depositing the title deeds of the land with the creditor. This in equity creates a lien upon the land in the creditor's favor. In England an equitable mortgage differs from other equitable liens in that it is not enforced by a sale of the land but by foreclosure like an ordinary mortgage, the mortgagor being compelled to convey an absolute title to the mortgagee. The same rule would probably be applied in those American states where the strict foreclosure of mortgages is practised; but this kind of equitable mortgages are hardly ever used in the United States. Any property which is required to be conveyed by a written instrument may be equitably mortgaged in the same way, *e.g.* shares of stock by a deposit of the certificate. Deposit of title deeds.

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[30] See § 672.

CHAPTER LI.

TRUSTS.

Uses not executed by the statute.

778. The statute of uses executed a use only when the feoffee was "seized" to uses, *i.e.* when the property conveyed to uses was a freehold estate. If personal property, including chattels real, was given upon uses, the statute did not apply and the use remained a mere equitable right. But the ecclesiastical lawyers, who had by means of uses evaded the statutes of mortmain, found means also to evade the statute of uses. They invented double uses; that is, land was conveyed to A to the use of B, and B was directed to hold to the use of C. The common law courts, taking a very narrow and technical view of the matter, decided that the second use was not within the statute. The use for B was executed, and the legal estate vested in him; but the second use, for C, remained a purely equitable right. Thus all the jurisdiction of the court of Chancery over uses which had been taken away by the statute of uses was restored to it by means of the simple device of a second use. The land of the ecclesiastical corporations having been mostly confiscated at the time of the reformation, and the feudal system becoming obsolescent, the evils which the statutes of mortmain and uses were designed to correct ceased to be felt as serious, and no further attempt was made to prevent the creation of equitable uses. The actual ultimate effect of the statute of uses, therefore, was very different from what its authors intended, and amounted merely to the introduction of certain more convenient methods of alienation of legal estates, which have already been mentioned.

Double uses.

Effect of the statute of uses.

Equitable uses.

779. There are thus two kinds of uses which are not executed by the statute, have never been recognized by the courts of common law and still remain within the exclusive jurisdiction of equity, namely, all uses in non-freehold property and second uses in freeholds. These took the name of trusts, and the old

Uses and trusts.

name of uses was confined to such uses as were executed by the statute. The original meaning of the word trust, therefore, was a use which was not executed by the statute of uses. But this way of disposing of property being found convenient, the principle of trusts was given by degrees a more extended application. A trust in the widest sense may now be said to exist whenever a right, which may be called the basis-right of the trust,[1] is vested in one person, the trustee, subject to a claim or equity in favor of another person, the *cestui* (or *cestuy*) *que trust*. The trustee corresponds to the ancient feoffee to uses, and the *cestui que trust* to the *cestui que use*.

Original meaning of trust.

Present meaning of trust.

780. The basis-right is most often a property right, and is generally called the trust property, as where property is given to A in trust to convey it to B, to permit B to use or enjoy it, or to invest it and pay the income from it to B. But other kinds of rights may be held in trust, such as debts and other obligations. A contract for instance may be made with A as trustee for B, so that, although A and not B is the party to the contract and the only person who has legal rights under it or can sue upon it at law, the performance of it must be to B or for his benefit. A trust right may itself be held in trust. Thus A may hold property as trustee for B, and B in turn hold his equitable right in trust for C, so that B is a *cestui que trust* as to A but a trustee as to C. The basis-right may even be a mere facultative right, or need not be in the strict sense a right at all. A power, authority or discretion may be held in trust. Powers of appointment are often so held. So where work is done by a contractor under a contract that it is to be paid for only on the certificate of an engineer that it is properly done, the engineer, not being a party to the contract, may refuse to act in the matter at all. But if he consents to act, he is a sort of trustee for the parties, and is bound to exercise his judgment in good faith. And if a servant or employee in the course of his employment become acquainted with his employer's trade

The basis-right, or trust property.

Contracts in trust.

Trust rights held in trust

Powers held in trust.

Secrets.

[1] This expression is not in common use.

secrets, he will be deemed to hold his knowledge in trust for his employer, and a court of equity will enjoin him from making use of it for his own purposes.

The basis-right must be specific.

The basis-right of a trust must be a specific right. If A agrees to sell to B one hundred shares of the stock of a certain bank on a certain future day, and at the time of making the contract he happens to be the owner of that precise number of shares, he does not become trustee of the shares for B, unless he has agreed to sell those particular shares and no others. If he can perform his contract by buying other shares and delivering them to B, there is no trust, because there is no specific or identifiable basis-right to which B's claim can attach. So a banker is not a trustee for his depositors, but a mere debtor to them; because he is not bound to keep each depositor's money separate and pay back to him the specific money which he deposited, but only to pay on demand a certain amount of money. But the ownership of a fund may be held in trust. Indeed the principal use of a fund in law is to serve as the basis-right of a trust; it is for this purpose mainly that a fund is reckoned as being a thing capable of being owned. This, however, is true only when the fund is intended to be and ought to be kept in a distinguishable form, embodied in specific rights or things. If a fund is by the terms of its creation designed to be indistinguishable, it is a mere debt[2] and not a trust. But if a fund which ought to be distinguishable is improperly or by accident reduced to an indistinguishable form, as where a trustee wrongfully mixes trust money with his own, the trust continues to exist.

Funds.

The trust right.

781. The right of the *cestui que trust*, his claim or equity, must be one that is enforceable in a court of equity. It may be either an obligation or an equitable lien. In a certain loose sense trust are sometimes said to exist at law, *e.g.* the name is occasionally applied to a legal obligation to pay over a fund. But trusts in the proper technical sense are peculiar to equity. Equitable liens and the obligations created by gifts in trust and declarations

What obligations can stand as constitusnts of trusts.

[2] See § 766.

of trust are equitable only, and can not exist except as constituents of a trust; and the same is true of obligations arising from the holding of rights belonging to another. Whenever one of those obligation or liens exists there is a trust. Obligations created by judgments of courts of common law and penalties are purely legal and can never stand as constituents of trusts. Contract obligations and obligations arising from the reception of benefits and from the *quasi*-possession of a fund are generally valid at law. But sometimes they are enforceable in equity; in which case, if they relate to the exercise or disposition of a specific basis right, they are trust obligations.[3]

Bare trusts.

782. When the duty of the trustee is merely to convey the trust property to the *cestui que trust* or to permit the *cestui que trust* to use and enjoy the trust property as if he were the owner of it, the trustee himself having no active duties, the trust is called a bare, naked or dry trust. Thus if property is given to A to pay the income to B for his life and after his death to transfer the property to C, the trust in favor of C after the death of B is a naked trust.

True and *quasi* trusts.

783. Trusts are divided into fiduciary trusts, or trusts in the strict sense, and non-fiduciary or *quasi* trusts, which latter are often said not actually to be trusts but to resemble trusts. The same is sometimes said of certain fiduciary trusts which are in certain respects peculiar, as where the basis-right is a mere authority or discretion or the duties of the trustee are somewhat different from those of ordinary trustees, as in case of an executor.

Fiduciary trusts.

A fiduciary trust is where the trustee holds the basis-right for the purposes of the trust only, having himself no beneficial interest in it unless he happens to be himself one of the *cestuis que trust*. Thus if a man by deed or will gives property to a friend in trust to pay the income to the donor's wife during her life and after her death to divide the principal among his children, the trust is a fiduciary one, the trustee holding the property wholly for the benefit of the wife and children. Such is also the character of the trust in the cases mentioned in § 780 of the authority

[3] As to what contracts can be enforced in equity, see § 947.

of a guardian as to his ward's marriage or of an engineer to pass upon the quality of work. Executors, administrators, guardians, the officers of corporations as to their official powers, which are given to them solely for the benefit of the members, and trustees of charities in most cases, are fiduciary trustees.

Non-fiduciary trusts.

But in a non-fiduciary trust the trustee has himself an interest in the basis-right. He holds it subject to the trust, but except for the requirements of the trust the property is his own. Thus if A sells his land to B and agrees to convey it at some future time, until the conveyance is made he holds it as trustee for B, and a court of equity will if necessary enforce the trust and compel him to make the conveyance. But the trust is not a fiduciary one, because until the conveyance is made he holds the land as owner, and is entitled to use and enjoy it for his own benefit. When the right of the *cestui que trust* is only an equitable lien the trust is not fiduciary, as for instance if A grants an equitable lien upon his land to B to secure the payment of a debt, or if a testator charges his debts upon his land and then devises the land to A subject to the charge. In each of those cases A is the owner of the land subject only to the chance of having it taken from him and sold for the debts, and he may redeem it by paying the debts.

Equitable liens.

Duties of trustees.

784. To a fiduciary trust the law annexes certain implied terms or obligations, the chief of which are as follows.

To keep the trust property separate.

The trustee must keep the trust property separate from his own, and in such a shape as to be always identifiable,

To keep accounts and vouchers.

and to this end must keep proper accounts and vouchers. If he does so, and the property is lost or injured or deteriorates in value without his fault, he is not responsible. But if he mixes it with his own, he is absolutely responsible for it; for instance if a trustee deposits trust money in a bank in his private account along with his own money, and the bank fails, he must bear the loss. His proper course is to open a separate account as trustee.

To take due care of the trust property.

The trustee must use due care to keep the trust property safe. But if he does so much as this he is not absolutely answerable for its safety. If however it is lost or injured by his negligence or fault, he must make good the damage. If

he has to invest it, the law, unless the agreement creating the trust provides otherwise, limits him to certain classes of investments which are regarded as especially safe, such as first mortgages on real property and government bonds. If he makes an improper investment, he is responsible for any loss. Investments.

The trustee must not use the trust property in any manner or for any purpose not authorized by the terms of the trust, or pay or deliver any of it to any person not entitled to it. Trustee's duty not to use the trust property wrongly.

He must not make or attempt to make in any manner, directly or indirectly, in his own name or in the name of another, any profit or advantage for himself out of the trust or the trust property. The law is very strict on this point, and will compel him to account to the *cestui que trust* for any gain which he acquires in violation of the trust. Thus if the trustee uses the trust property in his own business, he is not only absolutely responsible for the principal, but the *cestui que trust* may at his option claim either the entire profits accruing from such use of the trust property, if they can be identified, or legal interest on the fund; sometimes compound interest is allowed. So if the trustee takes a bribe from any person to influence his action as trustee, he must hold the amount received for the *cestui que trust* As a general rule a trustee is not entitled to any compensation for his services; but sometimes compensation is provided for in the creation of the trust, and in the United States he is now usually by statute allowed a reasonable compensation. No to make a gain for himself. Trustee's compensation.

Any breach by the trustee of his duties as a trustee is called a breach of trust. It is classed as a species of fraud. If done with a culpable intention, recklessly or in bad faith, it is actual fraud; otherwise it is constructive fraud, or, as it commonly said, conduct equivalent to fraud in the contemplation of a court of equity. Breach of trust.

The duties of the trustee, except the duty to take care of the trust property, are peremptory; so that the trustee is not excused if he commits a breach of trust, *e.g.* makes an improper investment, even by an innocent mistake. But if he is in doubt how to act he has the right to apply to the court for instruc- Trustee's duties are peremptory.

tions, and generally to charge the expense of such an application against the trust property.

Trustee must not expose himself to temptation

The trustee also is not permitted to put himself into any position where he will be exposed to temptation to be unfaithful to his trust. Thus if he is authorized to sell the trust property, he ought to sell it for as high a price as possible; therefore he can not himself be the buyer, even though he pays a full price for it. The court will not enter upon any inquiry as to the good faith of the transaction, but will set it aside at the request of the *cestui que trust* as being constructively fraudulent. So if he is authorized to purchase property for the trust, he can not purchase from himself, or if he has to invest the trust fund, he can not lend it to himself. And if he buys the rights of the *cestui que trust*, which he is not absolutely forbidden to do, there is a strong presumption of undue influence against him. The principles in this paragraph apply also to agents and all persons in fiduciary relations.

Trustee must account.

At the end of the trust, and sometimes during its continuance, he must render an account of his administration; and the *cestui que trust* has at all times a right to full information about the trust affairs.

Removal and appointment of trustees.

785. If a trustee misbehaves or is incompetent, the court may remove him, appoint another trustee, and require the original trustee to transfer the trust property to the new trustee. The court may also make a new appointment if the trustee dies, and compel a conveyance from the heir or personal representative of the former trustee. If a trust is created and no trustee is named, *e.g.* if a testator leaves property in his will in trust for a certain person and does not say who shall be trustee, the court will appoint a trustee. It is a maxim of equity that a trust shall never fail for want of a trustee.

Classes of trusts.

786. Trusts are either express, implied or constructive. The names implied and constructive trusts are often used indiscriminately An express trust is one that is declared in express words, either in an agreement or in a will; that is, it is created by a gift in trust or a declaration of trust. Equity usually disregards mere forms, and by the old law when a use was created by agreement *inter vivos* no forms of any kind were

Express trusts.

Forms

required. A use even in freehold land, and even though the use amounted practically to an estate in fee simple, could be created not only without a deed but even without any writing, by mere word of mouth. Such is still the rule as to trusts, so far as it has not been changed by the statute of frauds. But by that statute express trusts of real property can not be created or transferred without writing. The statute however does not require writing for any implied or constructive trust.

Statute of frauds.

787. An implied trust arises where no trust has been sufficiently expressed, but the law presumes from the circumstances that the parties intended to create a trust, or would have had such an intention if they had adverted to the matter.[4] This presumption is not absolutely conclusive. It can not however be rebutted simply by proof that the parties had in fact no intention at all, such an oversight or inadvertance being usually the very case for which the law desires to make provision. But it can be rebutted by proof that a contrary intention existed; the law will not force a trust upon the parties against their will.

Implied trust.

Very important implied trusts are what are called resulting trusts,[5] which are found in two cases.

Resulting trusts.

(1) Where an intention appears to create an express trust, but either the trust is never effectually created or after having been created becomes void or does not exhaust the whole of the basis-right. A trust is then said to result to the donor or his heirs or personal representatives or to some one appointed by him. For example suppose that A conveys land to B to hold in trust for such persons and on such trusts as A shall afterwards declare. It is evident that B is not in any case to hold the land for his own benefit; he must be trustee for some one. Therefore until A declares the trusts B holds as trustee for A, on a resulting trust, there being no other possible *cestui que trust*. If A dies without declaring any trusts, there is a resulting trust for his heir. The same would be the case if the trusts declared should be for any reason invalid. An

Failure of an express trust

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[4] These trusts are analogous to contracts implied in law when the presumption is not absolutely conclusive.

[5] See § 635.

example of the trusts not exhausting the whole basis-right would be if A should devise land to B in fee simple in trust for his wife for her life, and should make no disposition of the remainder of the estate. After the death of the wife a trust would result to A's heir or residuary devisee, there being no one else for whose benefit B could hold the land.

Trust not exhausting the basis-right.

Conveyances without consideration.

(2) Where real property is conveyed to a person either without any consideration or for a consideration which is furnished by a third person. As has been explained, a common law conveyance usually does not need a consideration. But in such cases a court of equity will presume that a gift to the grantee was not intended; and even though a use to the grantee is expressed, so as to prevent any resulting use from arising and to vest the legal estate in him, the grantee, unless a contrary intention is proved, will hold the property as trustee for the grantor or the person furnishing the consideration on a resulting trust.

Consideration furnished by a third person.

If A buys land with B's money, and takes a conveyance to himself, it is presumed that he bought it for B; and he becomes trustee of the land for B. A resulting trust however

Gifts to wives or children.

will not arise in such cases in favor of a husband against his wife or of a father against his child, it being presumed that the husband or father intended to make a gift. There

Gifts in equity.

is no rule in equity any more than at law forbidding people to make gifts, but equity requires that the intention to do so shall clearly appear, otherwise there will be a resulting trust.

Other implied trusts.

There are many other kinds of implied trusts that can not be enumerated here but will be found described in treatises on equity. For example if a testator leaves a legacy to his creditor, that does not at law prevent the creditor from recovering his debt. But in the absence of any thing to show a contrary intention, equity will presume that the testator did not mean that the creditor should have the debt and the legacy both, and will compel him to elect between the two and release to the executor the one which he chooses not to take; that is, there will be an implied trust in favor of the executor as to either the debt or the legacy. So the administration

Administration of assets.

of the estates of deceased persons in equity, the recognition

and distribution of equitable assets, the payment of creditors *pro rata*, the marshaling of assets, the compelling the executor or administrator to account, the enforcing the payment of legacies and distributive shares, is effected by means chiefly of implied and constructive trusts; though a charge of debts upon land creates an express trust.

Vendor's lien and equitable mortgage.

A vendor's lien and an equitable mortgage of land by the deposit of title deeds are implied trusts. The latter would seem to be in fact an express trust, since the intention to create a lien actually exists and is expressed; but it is classed among implied trusts, probably in order to take it out of the operation of the statute of frauds. In the same way if a debtor, instead of mortgaging his land to his creditor in the ordinary manner, where the deed on its face declares the transaction to be a mortgage, makes an absolute conveyance of the land to the creditor, so that the latter appears by the deed to be the absolute owner, the conveyance being actually intended merely as security, there is an implied trust that the creditor shall reconvey the land to the debtor on payment of the debt. This is called also an equitable mortgage, and it may be foreclosed like an ordinary mortgage.

Absolute conveyance to creditor.

Rebutting equity by parol.

In all cases where an implied trust would be opposed to the apparent intent of a written instrument the intention not to create a trust may be proved by parol evidence.[6]

Constructive trusts.

788. Constructive trusts are created independently of any actual or presumed intention of the parties, and even against the will of the trustee but not of the *cestui que trust*, for purposes of equity and justice.[7] They are raised by equity in most cases when by fraud, unlawful coercion, accident or mistake one person has got into his hands a fund or right properly belonging to another, in which case the trust is to pay, convey or release the fund or right to the other, or in a few cases where one person's property has received a benefit from another for which compensation ought to be made, in which case the trust takes the form of an equitable lien on the property to secure the payment of compensation.

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[6] See § 346.

[7] They are analogous to purely fictitious or *quasi* contracts.

The obligations in § 764 are cases of constructive trusts.

Penalties and forfeitures.

The jurisdiction of equity to give relief against penalties and forfeitures, as in the case of conditions subsequent, the penalties of bonds or mortgages, is based upon this principle. The party who by the other's default has obtained a right which it was never intended that he should actually have and which it would be inequitable that he should exercise, is compelled to hold it subject to a trust for redemption. Probably this was originally on the assumption that the default or breach of the condition happened by accident or mistake; but the rule permitting redemption is now well established and is applied even though the default was intentional. Thus a mortgagor who has wilfully refused to pay his debt on the law day or a person who has deliberately broken a condition may never-

Reformation of instruments.

theless redeem. The reformation of written instruments[8] is another example of a constructive trust, a person not being allowed to enforce a legal right conferred upon him by a mere mistake. So if A having two pieces of land sells one to B and by mistake conveys to him the other, each party is in the situation of holding a right which he ought not to have, and is deemed a trustee for the other.

Trusts *ex maleficio.*

If the trust arises from the fraud or wilful wrong of the party who is treated as trustee, it is called a trust *ex maleficio*. An example of this is found where a conveyance of land is got by fraud or duress. The grantor may rescind the transaction, and the grantee then holds the land as a constructive trustee for him.

Liens for improvements.

When one person in good faith and reasonably expends money in improving another's property, the improvements generally belong to the owner of the property, who may assert his legal rights and take possession of the property with the improvements without making compensation; and generally equity can not interfere, that is, the party making the improvements can not maintain an action in equity for compensation. But if the true owner is for any reason himself obliged to seek the aid of equity, the court of equity will usually give the other

[8] See § 327.

party an equitable lien for compensation, which is a constructive trust. This may happen for instance when a mortgagee has made improvements on or incurred expenses for the benefit of the mortgaged property, and the mortgagor after the law day seeks to redeem by proceedings in equity; the court in such cases will often allow him to redeem only on condition that he pays for the improvements.

Change in the form of the trust property.

789. If the form of the trust property is altered, the trust continues to attach to it in whatever form it takes, so long as it can be identified; and if it ceases to be identifiable, the trustee is still regarded as holding a fund in trust, which he may at any time put into a distinguishable form. If necessary the form of the trust obligation will be modified to adapt it to the nature of the trust property. Thus if A holds land in trust to permit B to possess and use it, and he sells and conveys the land, he will be considered to hold the money which he receives for it, or if he mixes that money with his own, then a fund of the same value, in trust, and will be required to pay interest on it in lieu of the use. If he then buys shares of stock for the trust with the money, the trust will attach to the stock, and B will be entitled to the dividends.

Against whom the trust avails.

790. The right of the *cestui que trust* is a right *in personam* against the trustee only. As to third persons the trustee is the absolute owner of the trust property, and he alone can bring any action against third persons regarding it. But if he wrongfully assigns or transfers the trust property to a third person, the trust continues to attach to it in the transferee's hands, the transferee takes it subject to the trust and becomes himself trustee, unless he is a *bona fide* purchaser for value, that is, unless he buys the trust property for a substantial valuable consideration without notice of the existence of the trust. In the latter case if the trust property is a right *in rem* the buyer takes it free from the trust, but if it is a right *in personam*, as where a debt or an equitable right is held in trust, the trust still follows it, in accordance with the rules in § 271 that the assignment of a chose in action is always subject to equities while the assignment of a right *in rem* to a purchaser in good faith and for valuable considera-

Transfer of the basis-right by the trustee.

Bona fide purchaser for value.

Enforcement of equitable liens.

tion is not. These principles apply also to the sale of property subject to an equitable lien. Whether the lien, which is a mere right *in personam*, can be enforced against the purchaser depends upon whether the property to which the lien attaches is a right *in rem* or a chose in action and whether the purchaser has notice of the lien when he buys.

Wrongful alienation of trust property; *cestui's* remedies.

Therefore if the trustee wrongfully and in breach of his trust transfers the trust property to a third person, the *cestui que trust* may have two courses open to him, either to ratify the transfer and hold the trustee responsible as trustee for the proceeds of the trust property which have come into his hands, treating the transaction as a mere change in the form of the trust property, or to follow the original trust property into the hands of the transferree and hold him as trustee, treating the transaction as a change of trustees. But he can not do both; he must elect which course to take. He must elect promptly, as soon as he reasonably can after notice of the wrongful transfer; otherwise he is deemed to have chosen the former course.

Election between remedies.

Rightful alienation by trustee.

If the trustee is authorized by the terms of the trust to sell the trust property, as for instance if it is invested in government bonds and the trustee is empowered if he thinks best to dispose of those and invest the money in some other way, and he does so, the buyer as a general rule takes it free from the trust even though he has notice of its existence.

Equitable property.

791. When the basis-right is a property right and the obligation of the trustee is to convey the property to the *cestui que trust* or to permit him to use and enjoy it as if he owned it, the right of the *cestui que trust* is called an equitable property right. Thus if land is devised to a trustee in trust to permit the testator's wife to possess and use it during her life and after her death to convey it to the testator's son, the wife has an equitable life estate in the land and the son an equitable remainder. But if the trust for the wife is that the trustee let the land, receive the rent and pay it over to her, she has no equitable property right in the land itself but only in the rent.

Equitable property rights are for the most part treated as nearly as possible like legal rights. This in one of the meanings of the maxim that equity follows the law. Equitable property rights may be either real or personal property, accordingly as similar legal rights would be, and on the death of the holder will descend to his heir or go to his personal representative according to their nature. In equitable real property estates may be had similar to those in ordinary real property; and in an equitable freehold of inheritance a husband may now have curtesy and a wife dower. It has even been held that, where the right to vote depended upon the holding of land, the holding of an equitable estate conferred the franchise. The rule against perpetuities[9] applies to equitable property. But equitable estates are not held on tenure, and need not be created or transferred by deed.

[9] See § 503.

D. DUTIES AND OBLIGATIONS OF PERSONS IN PARTICULAR SITUATIONS.

CHAPTER LII.

TENANTS AND BAILEES.

Persons in particular situations.

792. There are certain persons who, without being abnormal persons, yet have duties and obligations different from persons in general by virtue of standing in special relations into which they have entered generally by their own voluntary act. The first to be mentioned are tenants of land and bailees, including here under the name of bailee any person who has possession of a chattel, of which he is not the owner.[1]

Duties of possessors.

793. When a person has possession of a thing in which another has a property right, or sometimes when he undertakes to perform services for another, he owes duties to that other. In most cases there is a contract between the parties which creates an obligation. But whether there is a contract or not, there is always a non-contractual duty, which is said to be imposed by the law or to arise by operation of law, the breach of which may be a tort. Generally therefore if a tenant or bailee is guilty of a breach of duty toward his landlord or bailor, the latter may sue him either for a tort or for a breach of contract, and actions against bailees are about as frequently brought in the one form as in the other. There may in fact be three kinds of duties, namely: (1) by express contract, (2) by implied contract, (3) by operation of law. If the parties make an express contract, there will be no implied contract, according to the ordinary rule that the law will not imply a contract when there is an express one covering the same ground. The parties may make any sort of an express contract that they please; and if the terms of the express contract are inconsistent with the non-contractual duty, the latter gives way. Thus a

Contractual and non-contractual duties.

[1] See § 382.

bailee of a horse is bound, irrespective of any contract with the owner, to feed it properly. This non-contractual duty can not be stated in any more precise form; the law does not specify exactly how often the horse must be fed nor with what kind or quantity of food. But the parties may contract that the horse shall have so many quarts of oats twice a day, or that the bailee need not feed it at all. When there is an implied contract, its terms are the same as those of the non-contractual duty; that is, the law presumes that the party has contracted to do just what the law would say that he ought to do without any contract, for example, in the case of a bailment of a horse to feed it properly.

Nature of possessor's duties.

There has been some difference of opinion whether those non-contractual duties are duties corresponding to rights *in rem*, that is, in tenancies of land or bailments of chattels to the owner's property right in the thing and in bailments of services to the right of pecuniary condition, or are special obligations between the parties. In most cases the question is of no practical importance.[2]

Use by the possessor in excess of his right.

794. When the possessor has no right to use or injure the thing, or has only limited rights, as is generally the case with bailees or with tenants whose estates are not of inheritance, he stands as to the property rights of others in the thing in the same situation, he owes the same duties to others for the protection of their property rights in it, as if he were a mere outsider If a tenant or bailee uses the land or chattel in his possession in a way in which he has no right to use it, or injures it by his wrongful act, or wrongfully sells and delivers it to a stranger, he is guilty of a breach of the same duties as any one else would be who had done the same acts. Therefore there are no duties as to such acts which rest peculiarly upon possessors.

Voluntary waste.

795. This principle applies to the commission of voluntary waste. What tenants have a right to commit waste has been

[2] The opinion of the present writer is that the duties of bailees and tenants correspond to rights *in rem*, except the duties in § 800 to restore a chattel, which are obligations analogous to the obligations in § 761, 764.

already explained. Voluntary waste is a breach of the ordinary duties not actively to injure other persons' property, and not of any special duty resting on the tenant as tenant.

What acts are waste.

Such waste consists generally in acts which cause injury to the property not incidental to its ordinary use, such as tearing down buildings or felling timber. But any alteration in the property, even though not injurious, is generally waste, for instance demolishing an old building and erecting a new one in its place or even merely putting up a new building, which may in fact be an improvement, or turning arable land into pasture or pasture into arable unless done in the ordinary course of good husbandry. But the law of waste depends a good deal upon custom, and is less strict in the United States than in England. Erecting new buildings has been held not to be waste in the former country, or even making reasonable changes in buildings, such as cutting a new door; and clearing wild land for cultivation, leaving a proper allowance of timber land for use in connection with the cleared land, is rightful. When the ordinary use of land is injurious to it, as in case of mines or quarries or land used only for cutting timber, the line between lawful use and waste is not easy to draw. Generally a tenant may continue a former use in a reasonable manner; he may go on working an existing mine or continue an established manner of cutting timber, but may not open new mines or begin the cutting of timber on land not before used for that purpose.

Ordinary use injurious.

Permissive waste.

796. A tenant of land without the right to commit permissive waste must so use and protect the premises that they shall not suffer any substantial damage. The duty is not merely to use care, but is peremptory; so that a tenant has been held responsible where a building was burned by the negligence of a stranger or destroyed by a mob. The tenant however is not responsible for such damage or deterioration as is due to ordinary wear and tear, to the reasonable and proper use of the premises for the purposes for which they were let to him, or to natural decay. He is not bound to make repairs merely to obviate the effects of such deterioration But if repairs are necessary in the course of a reasonable and proper use of the premises to prevent further damage, he must make

Repairs.

them. Thus if a window pane is broken, the tenant need not replace it; he may go on living, if he chooses, in a house with a broken window. But if it be necessary to stop up the hole in order to prevent the rain from getting in and damaging the building, the tenant must do so, either by putting in a new pane or in some other way. If the house perishes by natural decay, he need not rebuild, but while it stands he should not suffer the roof to remain uncovered so as to let in the rain. The extent of his duty "will depend upon the age and general state and condition of the buildings at the time he took possession of them, the nature and extent of the repairs required for their preservation, and the duration of his own interest and term in the property; for a tenant at will or a tenant from year to year can not be expected to do as much for the preservation of the property as a tenant for a long term of years."[3] But a tenant is not responsible for damage caused by the act of God[4] *e.g.* by lightning or tempest, of the public enemy or of the lessor himself. At present by statute in the United States a tenant is also generally exempted from liability for damage by fire not due to his fault, by the elements and by the acts of strangers.

The act of God, *etc.*

797. The possessor of a chattel in which another has a property right must use due care to keep it from being lost, destroyed or injured. By the old common law no one but the possessor could sue a stranger for any injury to the chattel; and therefore, since the bailor had no other remedy, the duty of the bailee was much stricter. He was generally held liable to the bailor if the chattel was lost by theft or robbery or destroyed or injured by the unlawful act of a stranger, or perhaps if it was lost, destroyed or injured in other ways without his fault.[5] But after the bailor was given a direct action, the rigor of the ancient rule was relaxed, and the bailee is now only held to the exercise of due care for the safety of the chattel. If for instance a chattel is hired or borrowed and is

Duty of the possessor to take care of a chattel.

The ancient common law rule.

The modern rule.

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[3] 1 Addison, Torts, 279.

[4] See § 816.

[5] Holmes, Common Law, Lec. V.

lost, destroyed or injured without the fault of the hirer or borrower, he need not replace it or pay for it.

Duty of a wrongful possessor.

798. The wrongful possessor of a chattel must preserve it from loss, destruction or injury. If he transfers the possession to another, he does not thereby get rid of the duty. The duty is not merely to use care, as in the case of a lawful possessor, but is peremptory. Thus where the plaintiffs' goods rightfully in the possession of the defendants as warehousemen were accidentally injured by water, for which the defendants were not responsible, but the defendants afterwards wrongfully refused to restore them to the plaintiffs, it was held that the defendants were liable to the plaintiffs for damage subsequently resulting to the goods from their not being dried, although the defendants were so situated that it was impossible for them to dry the goods. So they would have been liable if the goods had been accidentally burned.

Responsibility arising from wrongful use.

If the possessor of a chattel uses it in a way in which he has no right to use it, or permits another to do so, he must absolutely prevent it from being lost, destroyed or injured in the course of such use. Thus if a thing hired for one use is put to a different use, *e.g.* a horse is hired to go to a certain place and is driven to another place, the hirer is responsible for even an accidental injury to it in the course of such improper use. And if a bailee negligently allows the chattel to go into the hands of a third person who has no right to it, he is responsible to the owner if it is wrongfully taken from such third person by a stranger.

Duties to restore.

799. The possessor of a thing may be bound to restore it to the owner when his right of possession comes to an end. As to land the tenant's duty is simply to quit possession. As to chattels there is a farther duty of restoration.

As to land.

As to chattels.

Duty of precarious possessor to restore.

800. A person who has a precarious possession[6] of a chattel must restore it on demand to the person having the right of possession.

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[6] See § 308.

Duty of a wrongful possessor of chattels to restore.

A person who has wrongful possession of a chattel, whose right of possession has come to an end so that her possession by him would be wrongful, must restore it once without demand to the person leaving the right of session.[7]

A wrongful possessor, whose possession is always preous, is therefore subject to two duties to restore, one ause his possession is precarious and one because it is ngful; and the former may continue to exist after the latter been barred by the statute of limitations.[8]

Holding *in mora*.

A person who continues in possession of a thing after he ht to restore it is said to hold *in mora*.[9]

Manner of restoration.

The duty is not necessarily actively to deliver; it is enough he party bound to restore places the chattel in a proper reasonable place so that the owner can conveniently and itfully take it, notifies him where it is and permits him take it; *e.g.* if the chattel is locked up in a box, the box st be opened; if it is on the land of a third person, his mission must be obtained for the owner to enter, or it must brought out to the owner.

The possessor's state of mind.

The possessor's state of mind is of no importance. If he ises to restore when he ought to, he is guilty of a breach this duty, even though he honestly and reasonably believes t he has a right to refuse; *e.g.* if a bailee refuses to restore chattel to the bailor, erroneously believing that he has a on it for services, or a postmaster refuses to deliver a letter the person to whom it is directed because he mistakenly nks that the full postage has not been paid.

Conflicting claims on a chattel.

801. A possessor is sometimes put into a very embarrassing ition by having demands made upon him by several different sons each claiming to be the true owner of the thing. In

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7 This duty is established by many authorities which hold that action of detinue, which was the appropriate form of action at mon law for enforcing the duties in this section (see § 921), will against such a possessor without any previous demand.

8 See § 804.

9 This is a civil law term, but now beginning to be used by common writers.

such a case at common law he had no course but to make his decision as best he could and take his chance of being right, being liable to an action by the true owner if he refused to restore the chattel to him or delivered it to the wrong person. It is very common for the possessor to take security from some one of the claiments and deliver the chattel to him; though he has no right to require a claimant to give such security. Equity however has provided a better remedy by what is called an interpleader, which will be hereafter described.[10] Also the possessor, if he is in good faith and reasonably in doubt as to the rights of the claimants, may if he chooses remain neutral between them, and without actively delivering the chattel to either, permit either to take it on his own responsibility. Thus where the plaintiff drew some logs to the defendant's saw-mill to have them sawed, and a third person came and took them away, claiming them as his, it was held that the defendant might rightfully permit this, since, if he had refused to permit it and the third person had really been the owner, the defendant would have been liable to him.

The possessor may stand neutral between claimants.

802. A demand by the person entitled to possession is necessary before suing for the chattel, when the possession of the party subject to the duty is rightful. But if the possession is wrongful, a demand is not necessary. As explained in § 800 a wrongful possessor is bound to restore without demand but a rightful possessor only on demand. When a chattel is hired or borrowed for a fixed time, and the bailee remains in possession after the expiration of the time but does not set up any adverse claim to the chattel, the bailor may, if he chooses, treat the continued possession as being by his permission and therefore rightful, so that the bailee will not acquire any right by lapse of time but the bailor may, even after the period of limitation, demand the chattel. If the owner of a chattel is induced by fraud or duress to sell it, that does not make the sale void but only voidable, so that the possession of the buyer is rightful, and the seller must demand the chattel back before he can sue for it. If the possessor wilfully injures or uses the chattel

When a demand is necessary.

Holding over by the possessor.

Possession by fraudulent buyer.

Wilful abuse of the chattel by the possessor.

[10] See § 954.

in excess of his right to do so, the owner may at his option treat that as putting an end to the right of possession and making the continuance of possession wrongful; but not if the possessor injures the thing by mere negligence. Thus if a person should hire for six months a river steamer not fit for sea service, and should send her on a sea voyage or should take out her machinery and use her as a hulk, the owner could sue at once to recover possession of her, without waiting for the six months to expire; but he would not have such a right if the bailee should merely neglect to clean the machinery so that it was injured or should carelessly overweight the safety valve so that the boiler burst.

Possession rightful against an assignee.

If while the possession lasts the owner assigns his rights to a third person, the possession, whether it was rightful or wrongful as against the assignor, is deemed rightful as against the assignee, so that the assignee can not sue for the chattel until he has made a demand for it. Thus if A wrongfully takes B's goods, and then B sells them to C, C can not have any action against A till he has demanded the goods of him, though A's possession was wrongful as against B and the sale by B to C was valid and conferred upon C a right of present possession.

By and upon whom demand must be made.

803. The demand, when necessary, must be made by the party entitled to possession or by some one authorized by him to make it, upon the party bound to deliver or some one authorized by him to receive a demand. Thus a demand upon a servant who has the custody of the chattel for his master is not usually sufficient, nor a demand made at a person's dwelling upon his wife in his absence for a chattel which he has in his possession and which is in the house at the time of the demand, it not appearing that he was keeping out of the way to avoid a demand. The demand must be made at a reasonable time, place and manner, and so that it can be complied with, or could be if the thing demanded were present. Therefore a demand by letter is usually nugatory; the possessor not being bound to send the chattel, there is nothing which he can do, and he may disregard the letter. However the person upon whom an insufficient demand is made may waive the insufficiency,

Time, place, and manner of demand.

and will generally be considered to have done so if he refuses delivery upon other grounds.

Effect of parting with possession.

804. Generally if the possessor voluntarily parts with the possession he does not thereby free himself from these duties. Thus where the defendant, a clergyman, in the year 1859 took the communion service of the church into his possession for safe keeping, and in the same year wrongfully sold it, and in 1870 the church-wardens, who had the right of possession, demanded the possession of the service, and on his failure to comply with the demand sued him to recover it, the clergyman pleaded that the wrong was done in 1859, and that therefore the right of action was barred by the statute of limitations. But the court decided that although there undoubtedly was a wrong committed in 1859, yet the defendant continued subject to his original duty to restore on demand, which was not broken until the demand was made in 1870, and on which the period of limitation did not begin to run until then.

Exceptions.

805. These duties are subject to certain exceptions and qualifications, the most important of which are the following.

Bailor presumed to be owner.

As between bailor and bailee the bailor is conclusively presumed to be the owner. Therefore the bailee can not refuse to restore the chattel to the bailor at the end of the bailment on the mere ground that not the bailor but some third person has the right of possession; in technical language, he can not set up any *jus tertii* against the bailor.[11] But if the true owner has asserted his right and demanded the chattel from the bailee or forbidden him to restore it to the bailor, the bailee may and should yield to the claim of the true owner and is then absolved from his duty to the bailor.

Claim by the true owner.

Goods wrongfully put or left in a place.

806. If a person's goods have come by his own wrongful act or omission into a place of which another has possession, *e.g.* if A wrongfully places his goods on B's land or, having been a tenant of the land, quits possession at the end of his tenancy and leaves them there, not only has he no right to enter and retake them without the consent of the possessor of

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[11] See a similar rule as to leased land in § 488. See also § 309.

the place,[12] but probably the latter owes him no duty either to deliver the goods to him or to permit him to enter and take them.

Termination of precarious possession.

807. When the possession is precarious either party has a right to put an end to it, the bailee as well as the bailor. If the possessor himself desires to terminate the possession, he should use due care to notify the party entitled to the possession of his intention and give him an opportunity to take the chattel. If the latter after such notice or reasonable endeavor to give notice does not do so, the possessor may store it in some proper place at the other's risk and expense, and so free himself from all further duty in regard to it.

Duties of the possessor.

Refusal of owner to receive.

808. If any possessor who is bound or has a right to surrender the chattel to the person entitled to the possession, makes an actual tender of it to the latter at a proper time and place, and the latter refuses to receive it, the possessor has performed his duty[13] and may, if he pleases, simply abandon the thing, *e.g.* put it out of his house into the street and leave it there If however he prefers to keep it in his possession, his continued possession, though without such tender it would have been wrongful, is rightful but precarious.

Doubt as to authority of demander.

809. When a demand for the possession of a chattel is made, if the possessor who is bound to deliver upon demand has any *bona fide* and reasonable doubt as to the authority of the person making the demand, he is entitled before complying with it to a reasonable time and opportunity to investigate, and, although no proof of the authority of the person making a demand need be given unless it is asked for, he may require the person who makes the demand to furnish reasonable proof of his authority or at least to inform him where he can find out about it. This does not mean that the possessor has a right to retain the chattel until he is actually satisfied in his own mind of the rightfulness of the demand made upon him, but only that he must be given reasonable proof or a reasonable opportunity to satisfy himself.

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[12] See § 740.

[13] See § 772.

Immediate delivery impossible.

If for any reason without fault on the part of the possessor he is unable to make delivery immediately upon the demand, *e.g.* if the chattel is then in some other place, he may have a reasonable time after the demand in which to deliver; and in that case he ought to inform the other party when and where he will do so.

Delivery impossible.

810. The possessor is excused from the duty to deliver, if delivery has become impossible by reason of something which happened without his fault while his possession was lawful; *e.g.* if the chattel is accidentally destroyed or taken from him by a third person. But he is not excused by any thing which happens after he ought to have delivered and while he is holding *in mora*.

Grounds for refusing to deliver.

811. As a general rule a person who refuses upon one ground to deliver a thing may afterwards justify his refusal upon a different ground. For example if A has possession of B's goods and, B having demanded them, refuses to give them up asserting himself to be the owner, and B sues him to recover them, A may defend himself by proving that he had a lien upon them. But if the reason given for the refusal is not the want of authority of the person making the demand, the insufficiency of the demand itself or the need of time to comply with it, all those grounds of refusal are deemed to be waived and can not be afterwards relied upon to justify the refusal.

Waiver of certain defences.

Bailment of services.

812. Bailment, as already explained, may be of services as well as of chattels.

Undertakings to render services.

As a general rule, and apart from contract, a person who undertakes to render any service to another is not bound to perform his undertaking at all, or may perform a part and leave the rest undone. Thus where the plaintiff and defendant were joint owners of a vessel which they desired to have insured, and the defendant undertook to attend to the matter and procure the insurance, telling the plaintiff that he could rely upon his doing so, but omitted to attend to it, so that, the vessel afterwards being wrecked, the plaintiff lost the value of his share, it was decided that the defendant was not liable to the plaintiff. There being no contract between them, the defendant's voluntary undertaking imposed no duty upon him.

813. But if a person undertakes to render services for another and actually enters upon the performance of his undertaking, he must use due care to perform what he does do in a proper manner, and he must not abandon the performance in an unreasonable manner so as to cause damage to the other party thereby. Thus if a physician undertakes to treat a poor patient without pay, he is nevertheless bound to use due care and skill in his treatment, and he ought not to quit suddenly and without warning at a critical moment, *e.g.* in the middle of an amputation, when his place could not be supplied and damage would result. Duty of bailee of services.

The defendant, a teacher in a public high school, was employed by the committee whose business it was to examine candidates for admission to conduct the examination for them. The plaintiff applied for admission and answered the questions propounded in such a manner as to entitle him to be admitted; but the defendant, either intentionally or negligently, reported him as having failed. It was held that he had a good cause of action against the defendant, the court thinking the teacher's conduct a breach of this duty. So it has been decided that even when a railroad company was not bound to keep a flagman at a highway crossing to warn travellers of approaching trains, yet if it did keep one there it was responsible for his negligence in failing to give warning.

In order that a person may be considered as having undertaken to render a service for another, it is not necessary that there should be any sort of a contract between them, express or implied, as is shown by the examples above given. There may even be a contract between the person subject to the duty and some person other than the one to whom the duty is owed, as in the case of the erroneous report on the result of an examination, where there probably was a contract between the committee and the teacher. So if a husband hires a physician to attend his wife, doubtless the woman can have an action directly against the physician for any negligence in his treatment by which she is injured. On the other hand it is not enough that a person may be benefited by the performance or injured by the non-performance of the act to enable it to be said that it was For whom the service is undertaken.

undertaken for him. Thus where a city was authorized but not required by its charter to organize a fire department and provide appliances for putting out fires, but negligently provided defective and insufficient fire-engines and hose, entrusted their management to incompetent men and failed to provide a sufficient supply of water, in consequence of which a fire was not extinguished but spread to the plaintiff's house and burned it, it was held that the plaintiff had no cause of action against the city. It could not be considered as employed for the plaintiff to put out fires. There seems to be no general rule to determine for whom the performance is considered to be undertaken, and the question has been found one of much difficulty.

CHAPTER LIII.

COMMON CARRIERS AND INNKEEPERS.

Bailment and special duties.

814. Common carriers and innkeepers are bailees, and have similar duties to those of other bailees. But they are also subject to certain special duties stricter than those of bailees in general, which are said in the old books to arise by the custom of the realm or the custom of England.[1]

Who are common carriers

A common carrier is a person who holds himself out as carrying on a regular trade of transporting passengers or goods or both for the public generally for hire, such as a railroad company, the proprietor of a stage coach, a cabman or truckman or an express company.[2]

Private carriers.

A private or special carrier is one who carries once or occasionally, not as a regular business or for the public generally. He is a mere bailee, having no special duties.

A common carrier's duty to carry.

815. A common carrier differs from tradesmen generally in not being permitted to select his own customers or fix his own charges. He is bound to carry for all persons who request him to do so and who pay or tender the price of the carriage, so long as he has room in his vessel or vehicle and facilities for handling the business. But a common carrier is not required to furnish any greater facilities than he chooses or to consult the convenience of the public in his times of running or the manner of doing his business. A stagecoach proprietor for instance may run as small a coach and run it as infrequently as he pleases, no matter how many persons there are who want to go by it. Howeve it is held in the United States that a carrier who has received special franchises or privileges from the state, such as a railroad or ferry company, must provide facilities sufficient reasonably to accommodate the ordinary traffic seeking to go by his line; a railroad company for instance must run a sufficient number of trains and have proper stations at

What facilities he must provide.

Carrier's having special privileges.

1 Holmes, Common Law, Lect. v.

2 As to ships being common carriers, see § 842.

Right to reject passengers and goods.

convenient places. A carrier may refuse to receive as a passenger a person who is drunk and disorderly, has a contagious desease, is filthy and obnoxious to other passengers or for any reason is unfit to be carried, or may reject goods which are dangerous or improperly packed or such as he does not hold himself out as willing to carry.

Reasonable rates.

He must carry for all persons at reasonable rates. He is not, however, bound to charge the same rates to all persons, provided his charges in any case do not exceed what is reasonable.[3] Because he can not refuse to carry, he has a right to demand his pay in advance, contrary to the general rule that services are not to be paid for till they have been rendered; and if he does not choose to do so, he has a common law possessory lien on the goods which he carries to secure his pay, and need not deliver the goods till he is paid. But he has no such lien on a passenger, and can not detain or imprison a passenger to compel him to pay his fare. Imprisonment for debt, even under the judgment of a court, is not now allowed, still less private imprisonment. His compensation for the carriage of goods is called freight.[4]

Payment in advance.

Carrier's lien.

Freight.

Must forward promptly.

A carrier who receives goods to carry must forward them promptly unless prevented by circumstances beyond his control. A strike of his own servants will not excuse him, because it is his business to have proper and sufficient servants; but for a delay caused by mob violence, whether or not the mob be composed of his own former servants who have gone out on strike, he is not responsible. If he receives goods knowing that for any reason he can not forward them promptly, and without informing the shipper, he is liable.

The carrier's strict common law liability for goods.

816. A common carrier is absolutely responsible for the safety and safe transportation and delivery of goods entrusted to him. He is said to be an insurer of them. It is not enough that he uses due care, or even extreme care, about them

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[3] So is the weight of authority, though there are decisions holding that he is bound to charge the same rates to all persons for the same services. In some places this is regulated by statute.

[4] In common parlance the word freight is also employed to denote the goods carried.

like an ordinary bailee. He is liable if they are lost, destroyed or injured by mere accident, without his fault, as by accidental fire, or by the wrongful conduct of third persons, as by thieves, robbers or rioters.[5]

Exceptions to carrier's strict liability.

To this strict liability of the carrier there are however certain exceptions, either by law or by contract.

Act of God.

By law he is exempted from liability for a loss caused by the act of God or of the public enemy. The expression "act of God" means some sudden, violent and unusual operation of the forces of nature causing damage without the cooperation of human acts; for instance lightning, earthquakes, unusual storms and floods or untimely and severe frosts, but not ordinary winds and currents or inundations that occur regularly at certain times and can be counted on beforehand. Nor if a vessel is cast away in a storm by bad seamanship is it the act of God; because human agency has cooperated. However there is much conflict among the decisions as to exactly what is comprehended under this name. Public enemies are persons carrying on regular war against the carrier's government, not for instance robbers, mobs or rioters. But pirates are *hostes humani generis*, and are reckoned public enemies.

Public enemies

Proper vice of goods.

A carrier also is not responsible for losses due to the "proper vice" or inherent qualities of the goods carried, for example if a cargo of fruit rots on the passage or animals sicken and die, or to the fault of the shipper, as breakage from bad packing.

Fault of the shipper.

Limitation of liability by contract.

817. A carrier may also limit his liability by a contract with the shipper to that effect. Several different views have been taken by the courts of such contracts, as follows.

(1) That any contract by which a carrier attempts to limit his common law liability is against public policy and void.

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5 Various reasons have been given for this strict rule, mostly mere guesswork. The fact seems to be that it is a survival of what was once the rule in all cases of bailment (see § 796), but why it survived in this particular case is probably not now known. The courts at present disfavor the rule and are inclined admit exceptions to it freely.

(2) That a carrier may by contract free himself from his strict liability as an insurer but not from his duty to use due care for the goods; that is, that he can not contract against responsibility for the negligence or wilful misconduct of himself or his servants.

(3) That a carrier may contract for exemption from responsibility for any loss or damage except from his personal wilful or criminal conduct, but that a contract will not be construed to exempt the carrier from responsibility for his own or his servants' fault unless it expressly and in terms says so, mere general words, such as "loss or damage from any cause whatever," will not suffice.

The first rule prevails at present in only a very few places. The second and third have obtained about equal acceptance.

Limitation of liability by notice.

A mere notice of the terms on which the carrier will receive goods will not amount to a contract which will relieve him from his liability unless assented to by the shipper at the time of making the contract. Thus if a carrier hangs up a written notice in his office or publishes it in a newspaper, and afterwards receives goods for carriage from a shipper who has not seen the notice, or if after receiving the goods, and therefore after the contract of carriage has been completely made, the carrier gives the shipper a receipt with printed conditions on the back or margin, there is usually no contract. But if a shipper with knowledge of the terms of such a notice should deliver goods to the carrier without objecting to the terms, he would generally be considered to be bound by them. In England this subject is regulated by statute, and contracts to exempt carriers from liability must in most cases be in writing and signed by the shipper.

Statutory regulations in England.

Carrier's duty to deliver.

818. At the end of the transit the carrier must deliver the goods to the person entitled to receive them. If he delivers to the wrong person, even by mistake and after making every possible effort to find out the right party, and even though he is deceived by the fraud of the person to whom he delivers, he is responsible for the value of the goods He delivers to any one at his peril.

Misdelivery.

As to the place of delivery, whether the carrier must take the goods to the consignee's house or place of business or whether the consignee must come to the carrier's station or landing place and get them, and whether in the latter case the carrier must give notice to the consignee of their arrival, depends partly upon usage, and the rules are different in different places. Generally a carrier by water need only deliver at the water's edge at a proper landing place, and a railroad company at its own station. An express company ought to deliver at the consignee's residence or place of business. Place of delivery.

819. When the carrier has done all that he could or all that he was bound to do to make delivery but has not succeeded, as for instance if the consignee can not be found, or refuses to receive the goods, or does not come and take them as soon as he ought, or refuses to pay the freight so that the carrier retains them by virtue of his lien, the carrier is said to hold the goods no longer as carrier but as warehouseman or bailee. He is then responsible only like an ordinary bailee for due care, and is freed from his strict liability as an insurer, so that if the goods are lost, destroyed or injured without his fault he is not answerable for them. Or he may if he chooses store the goods in some proper place at the risk and expense of the owner, and rid himself of all responsibility for them. Inability to make delivery. Holding as warehouseman. Storage of the goods.

820. A common carrier of passengers is not an insurer of his passengers' safety. He is bound to use extreme care,[6] not merely ordinary care, as to the manner of the transportation and as to the condition of his appliances which are directly used in transportation and from the defective condition of which danger to his passengers may reasonably be apprehended, such as the bridges, tracks and rolling-stock of a railroad, or a stage-coach used for carrying passengers. It was held in some old cases that he was under an absolute duty to furnish a road-worthy vehicle; but it is now settled that his duty is only to use extreme care in that respect. But he is responsible for an injury to a passenger caused by a defect in such appliances due to want of skill or to negligence in the process of manu- Carrier's duties as to the safety of passengers. Responsibility for others' negligence.

[6] See § 297.

facture, although he himself was not the maker but bought the appliances from a reputable maker, and the defect was one which he could not have detected by a careful inspection. Thus if a railroad company buys a car from a car-builder for use on its road, and there is a hidden flaw in one of the wheels whose existence is due to negligence in casting, and the company's servants carefully examine the car before putting it into use but can not detect the flaw, and the car breaks down because of the flaw and a passenger is injured, the railroad company, though entirely free from blame, is responsible for the injury. This is often expressed by saying that a carrier's appliances must be as safe as human care and skill can make them; though that statement is not quite accurate. The carrier however is not bound to adopt every new invention in the way of appliances as soon as it is brought out, even though it is better and safer than what he is using. He is justified in using such appliances as carriers generally use.

Adoption of new inventions.

A common carrier is absolutely bound to protect his passengers from ill-treatment by his own servants, which is contrary to the general rule that a master is not liable for wanton and intentional wrongs committed by his servants.[7] He may make reasonable rules for the regulation of his passengers, and may expel them if they refuse to conform to such rules.

Violence of carrier's servants against passengers.

Rules for government of passengers.

He may limit his liability by a contract with his passengers. Generally a railroad ticket or a baggage check is not a contract but a mere voucher or receipt, and anything printed upon it purporting to limit the carrier's liability is in the nature of a notice, and will not have any effect unless the attention of the passenger is called to it or he has knowledge of it at the time of making his contract of carriage and assents to it.

Limitation of liability by contract.

Tickets and baggage checks.

The duties of a common carrier are the same to a passenger who is carried free as to one who pays fare; but if a passenger accepts a free pass, any conditions or limitations of the carrier's liability contained it have the force of contracts.

Passengers carried free.

821. As to a passenger's baggage, the duties of the carrier are those of a carrier of goods. Baggage includes only such

Passengers' baggage.

[7] See § 1006.

things as passengers usually carry with them for use on the journey or for use during a short stop, as when a person goes to visit a friend. This includes a reasonable sum of money for use on the journey. But a large sum of money, or samples of merchandize or presents for friends carried in a passenger's trunk are not baggage, and the carrier is not an insurer as to those unless he has agreed to be. He is only responsible as a gratuitous bailee, and not even so if such things are carried by a passenger secretly without the carrier's consent. Generally by custom baggage is carried free, but the carrier may limit the quantity of baggage which he will thus carry and require the passenger to pay freight on any excess.

Sleeping car companies.

822. When, as is often the case, sleeping cars do not belong to the railroad company to whose trains they are attached but to a separate company from whom the railroad company hires them, the sleeping car company is neither a common carrier nor an innkeeper, even though it sends its own servants to take charge of the cars. It is a mere bailee of services.

Telegraph companies

823. A telegraph company is not a common carrier of messages, but a mere bailee of services. Generally its contract is made with the sender of the message, not with the receiver. If a message is sent incorrectly or never delivered, and damage thereby ensues to the person to whom it is sent, it is held in England and in some of the United States that that person has no remedy against the company, because he has no contract with it, unless indeed the sender happens to be his agent so that he is a party to the contract. But in many cases in the United States the company has been held liable to him, either on the ground that the contract was made for his benefit, or that the company had undertaken to perform a service for him and had thus come under a duty to him.

Rights of the person to whom a message is sent.

Innkeepers.

824. An innkeeper is a person who holds himself out as carrying on a regular business of keeping a public inn for the reception of travellers or transient guests and furnishing them with lodging and food for a price. An inn is distinguished from a boarding house, which does not regularly receive transient guests, and also from a lodging house, which furnishes only

lodging and not food, and from an eating house or liquor saloon, which does not furnish lodging. A summer hotel at a watering place has been decided to be a boarding house rather than an inn. But an innkeeper may take boarders as well as guests.

An innkeeper must receive guests.

An innkeeper must receive as a guests any person who applies to be received, so long as he has room in his inn. But like a carrier he may reject a person who comes in an unfit condition; and taking boarders is optional with him. He may expel a guest for gross misconduct or for refusal to pay for his accommodation or to comply with the reasonable rules of the inn. He can only charge a reasonable price for entertainment and may demand pay in advance. He has a lien for his pay on all goods which a guest brings to the inn, and may detain them till he is paid. But he can not detain the person of the guest.[8]

Reasonable charges.

Innkeeper's lien.

Responsibility for guest's goods.

Like a common carrier an innkeeper is an insurer of the goods of his guest, not merely of baggage but of all goods which he permits the guest to bring to his inn. He is answerable for them if they are injured, lost or destroyed even without his fault, as by theft or accidental fire, but not for the act of God or the public enemy, the proper vice of the goods or the fault of the guest himself or of a companion of the guest who comes to the inn with him. At present it is generally enacted by statute that if an innkeeper provides a safe place of deposit in the inn for money, jewellery and other small articles of value and notifies the guests that they may deposit their valuables there, he is freed from liability for all such articles as are not so deposited.

Safe for deposit of valuables.

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[8] See § 815.

CHAPTER LIV.

SHIPPING.

Ships are chattels

825. A ship is a chattel and the subject of ordinary property rights. But the rules regarding ships and persons connected with them are in some respects peculiar, being derived mainly from the maritime law though adopted to a large extent by the common law courts.

Nationality of ships.

A ship like a person has a nationality, and her legal ownership must be vested in persons of the same nationality. Thus an American ship must be owned entirely by American citizens. The United States, like most nations, does not allow foreign vessels to engage in its coasting trade, that is, to carry goods or passengers between two American ports; but trade between the United States and foreign countries is open to vessels of all nationalities. A ship has also something resembling a domicile. She is registered as belonging to a particular port. The register of a ship is an official record kept at her home port of her description and of property rights in her.

Coasting trade of the United States.

The ship's home port.

The ship's register.

Transfer of ownership.

826. Contrary to the general rule as to chattels, a transfer of the ownership of a ship must be by a written bill of sale and must be entered in the ship's register. In the United States a transfer not so made is valid between the parties, but is void as against the creditors of the registered owner and purchasers from him in good faith and for valuable consideration. The original bill of sale from the builder of the ship to her first purchaser is called the grand bill of sale.

Grand bill of sale.

Co-ownership.

827. Ships are oftener than other kinds of property held in common ownership. In England a ship is deemed to be divided into sixty four shares, and no one may hold a fraction of a share; but in the United States the ownership may be held in any proportions.

Possession and use of the ship.

The rights of co-owners under the maritime law as to the possession and use of the ship are different from the common law rights of co-owners of other chattels. If the owners can not

agree, the court of admiralty will give the possession of the ship to the majority in value of the owners and authorize them to employ her "upon any probable design," that is, in any reasonable employment, on their giving security to the minority for the safety of their interests. Those of the owners who engage the ship in any undertaking or adventure become partners for that adventure in her use, and must contribute in proportion to their interests toward her outfit and the other expenses of the voyage, and share the losses or profits in the same proportions. But the dissentient minority do not participate in the charges, risks or gains of that adventure. But in the ownership of the vessel, as distinguished from her use in a particular adventure, the co-owners are not partners, and therefore one has no general authority to order supplies or repairs for the ship and bind the others for their payment. A contrary rule however prevails in the courts of law and equity in some of the United States, the co-owners being treated as partners.

Co-owners not partners.

Liens on ships.

828. Ships like other chattels may be pledged or mortgaged. Mortgages should be entered in the register like other transfers.

Maritime liens.

But the most important kind of liens to which ships are subject are maritime liens. A maritime lien is a right in the nature of a hypothecation created by the rules of the maritime law against a ship and the freight which she may have earned, and in some cases against the cargo of a ship or other property at sea. It is enforced by a peculiar kind of action known as an action *in rem*[1] brought in a court of admiralty against the ship herself or against the property subject to the lien, in which action the court will sell the ship or other property and out of the proceeds pay the claim to secure which the lien is created. Such liens can not originate on shore, but if a lien has once attached at sea it will not be devested by the property being landed. They are rights *in rem*, and therefore can be enforced even against a purchaser of the property for a valuable consideration without notice of the lien

829. Maritime liens arise either from services rendered to the ship or from wrongs committed by its instrumentality.

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[1] See § 960.

Repairs and supplies.

Generally when repairs or supplies are furnished to a ship in a foreign port,[2] where it may be difficult to obtain any remedy against the owners personally, the person furnishing them has by the American law, which agrees in this respect with the law of most countries, a maritime lien upon the ship for his pay. But no such lien arises in a home port.

Bottomry and respondentia.

830. Maritime liens are also created by the contracts of bottomry and respondentia.

Bottomry is where in case of necessity money is borrowed to enable a ship to pursue her voyage, and the loan secured by a lien on the ship which is called the bottom. Respondentia is a similar loan on the security of cargo laden or to be laden upon a ship. These liens are enforceable only in the courts of admiralty.

The contract is generally made by the master of the ship, but sometimes by the owners of the ship or goods. However the owners can not make such a contract in a home port, because the necessity for it is presumed not to exist there. Only strict necessity will justify the contract; that is, the money must be imperatively necessary to enable the ship to prosecute her voyage or for the preservation of the ship or cargo, and there must be no possibility of obtaining it on personal credit or, if the contract is made by the master, of communicating in time with the owners and receiving it from them. This condition in this age of steam and telegraphs makes these loans less usual than they formerly were. The master by the contract binds himself or the owners or both to repay the money with interest if and when the ship arrives at the end of her voyage. If the ship is lost and never arrives, the lender loses his money, and on this account the rate of interest charged is generally much higher than upon ordinary loans, and is known as maritime interest. The usury laws, forbidding interest higher than a certain rate to be paid, do not apply to these loans where the principal itself is

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2 The states of the United States are regarded as foreign to each other for this purpose.

at risk.[3] The contract creates a personal obligation against the owners and master, and also gives the lender a maritime lien on the ship or goods for his security. The contract must be in writing, and is generally called a bottomry or respondentia bond.

General average.

831. An obligation to pay general average[4] is accompanied by a maritime lien in the United States, but not in England.

Salvage.

Salvage is where property in danger of perishing at sea is rescued by outsiders who are under no duty to do so. The crew of the vessel can not be salvors, because it is their duty to do what they can to save the ship and cargo, nor in general can passengers, because they act for their own safety also, though in some cases when passengers have rendered extraordinary services they have been treated as salvors. Salvors are entitled to reasonable compensation for their services, which is called salvage,[5] and have a maritime lien on the property saved to secure its payment.

Rank of liens.

832. Generally when different persons have rights in the same thing, an earlier right takes precedence of a later one; for example if there are a number of mortgages or judgment liens on the same land, and the land is sold to satisfy the claims, the lien that first attached must be first paid. But in this class of maritime liens the reverse is the rule; the latest lien takes precedence of all earlier claims and rights, of whatever nature; because the service out of which the lien arises is presumed to have saved the property for the benefit of all parties interested in it.

Liens arising from wrongs.

833. When a ship has been made the instrument of committing a wrong, for example if one ship has negligently run into another, the ship herself, as distinct from her owners or the persons actually at fault, is considered responsible for it, a claim for compensations arises against her, and a lien upon her to secure the payment of it.

Statutory liens.

834. In some of the United States liens resembling mechanics' liens[6] have been given by state statutes to persons

[3] See § 767. [4] See § 404.

[5] For another meaning of salvage, see § 404.

[6] See § 554.

furnishing supplies or repairs to ships in their home ports. These are not maritime liens, because the states have no maritime law, but are hypothecations enforceable in the courts of common law or equity.

The ship's husband.

835. The owners of a ship often appoint a person as their agent on shore for the management and care of the ship, who is called the the ship's husband, or if he happens to be an owner, the managing owner.

The master and mates.

836. The commanding officer of a merchant vessel is called the master,[7] and his subordinate officers mates. Masters and mates must be examined as to their qualifications and receive a certificate from the public authorities before they can act as such. They are required to be of the same nationality as the ship.

The master's authority.

For the safety of the ship and of the persons and things on board the master's authority is very large and almost despotic. Everyone on board, passengers as well as the crew, is subject to his orders, and he may use any force necessary to carry his lawful orders into effect and maintain discipline on board, even to taking life if necessary. He has no authority to punish a passenger for past misconduct, but may imprison him to prevent him from misbehaving. But he may punish the seamen if necessary to preserve discipline. Whipping, which was formerly a common mode of punishment, is now forbidden by statute.

The log.

It is the master's duty to keep a log or history of the voyage, in a book called a log book, in which the position of the ship from day to day, and all important incidents of the voyage should be entered.

The master as agent for the owners.

837. The master is for many purposes the agent of the owners. The owners may confer upon him by actual agreement whatever powers they please, for instance the powers of a ship's husband. But in the absence of any such special authority, he has extensive powers by implication of law to pledge the owners' credit or bind them by contract. Contracts of affreightment are generally made by the master, except at ports where

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[7] Master rather than captain is the proper appellation. A common colloquial name is skipper.

the owners have regular agents for that purpose; and it is by him that bills of lading are usually signed.[8] In cases of necessity, when the owners or their regular agents can not be applied to in time, the master may make contracts for necessary supplies, outfit or repairs for the ship, may hire seamen or borrow money for the ship's use, and may even hypothecate the ship or cargo by a contract of bottomry or respondentia.

he master's personal liability.

Contrary to the general rule as to agents, the master himself, as well as the owners, is personally bound by such contracts made by him.

Sale of ship or cargo.

Under the pressure of absolute necessity, when money must be had for the prosecution of the voyage or for the safety of the ship and can not be raised in any other way, the master may even have authority to sell the cargo or a part of it; and if the voyage is broken up by any disaster he may, in case of necessity, sell not only the cargo but the ship as well, when that is the only way to save anything for the owners from what would otherwise be a total loss, for instance if the ship is disabled and can not be repaired or the cargo is spoiling, and there is not time to communicate with the owners. In those cases of emergency the master must act with care, prudence and good faith for the benefit of all persons interested in the property, including the underwriters if it is insured.

Wrongs by masters and mariners.

The owners are responsible for wrongs committed by the master and by the mariners, who are their servants, in the course of their employment, on the same principles as other masters. But by statute this extensive liability has been considerably limited, as will be explained in another place.[9] The personal responsibility of the owners, which exists both at common law and by the maritime law, is separate from the responsibility of the ship herself when she has been the instrument of committing a wrong, which latter is only under the rules of the maritime law.

samen; shipping articles.

838. Seamen, except for small coasting vessels, must be hired by a written agreement known as shipping articles. Contrary to the general rule that a breach of a contract is

[8] See § 844. [9] See § 842.

not a crime and that a contract for personal services can not be specifically enforced,[10] desertion of the ship by a seaman in violation of his agreement is punished criminally, and the deserter can be arrested and brought back on board. However a seaman may be discharged by a consul in a foreign port before the expiration of his term of service for good cause, such as the non-payment of his wages or ill-treatment by the master. By the maritime law seamen were not entitled to their wages unless the ship arrived at the end of her voyage and earned freight. This is expressed in the maxim that "freight is the mother of wages." That rule, which was intended to secure faithfulness on the part of the crew, has been abolished by statute in England. Seamen have a maritime lien on the ship and freight for their wages. Seamen being an ignorant and improvident class of men, many statutory provisions have been made for their protection, to secure them against being inveigled into disadvantageous contracts and against ill-treatment and neglect of their health and safety.

Desertion.

Discharge of a seaman.

Wages.

Statutory regulations.

839. Barratry of the master and mariners is wilful misconduct on their part without the consent of the owners and in breach of their duty to the owners, whereby the ship is lost; such as wilfully casting away the ship, running away with her and selling her, or smuggling or breaking blockade and thus causing the confiscation of the ship. But mere negligence resulting in the loss of the ship is not barratry.

Barratry.

840. At many ports where the traffic is large and entrance and exit is difficult, duly qualified persons are appointed to act as pilots. A ship going in or out must take a pilot or be liable to a penalty for not doing so. While on board the pilot has control of the navigation of the vessel to the exclusion of the master. But when the taking of a pilot is compulsory he is generally held not to be the agent of the owners so as to make them responsible for his misconduct.

Pilots.

841. Many statutory provisions have been made as to the equipment, furnishing, manning and loading of vessels to prevent

Statutory provisions as to ships.

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10 See § 947.

their being sent to sea in an unsafe and unseaworthy condition; and an elaborate system of rules of navigation exists, partly customary but mainly statutory, on such matters as carrying lights at night, towage, rights of way when two vessels meet or one passes another, lookouts and fog and danger signals.

hips as common carriers.

842. A ship may be a common carrier. A regular liner and what is called a general ship, which is where a ship is put up or advertised to take goods or passengers for the public generally for a certain voyage, are such. But if the owner of a ship carries his own goods in her, she is not a common carrier as to those goods. By the law of both the United States and England the owners, or in some cases the charterer,[11] are personally subject to the duties of a common carrier and responsible for a breach of them; and so is the master. But by statute in both countries the personal liability of the owners, both as common carriers and for the misconduct of the master and mariners, has been greatly restricted, being limited, when they are not themselves at fault, in the United States to the value of their interest in the ship and freight and in England to a certain sum per ton of the ship's registered tonnage. By the American law the ship herself is also subject to these duties, and a breach of them may give rise to a maritime lien upon her for compensation.

Who is responsible as carrier.

Statutory limitations of owners' liability.

The ship's responsibility.

Passengers.

As carriers of passengers ships are in the main subject to the same rules as other carriers. But there is an implied contract or warranty to the passenger that the ship is seaworthy, and many statutory regulations have been made for the safety and comfort of passengers.

Affreightment.

843. Contracts of affreightment for the carriage of goods at sea are usually made in writing, by charter or bill of lading,[12] though writing is not necessary.

Charter-parties.

A charter or charter-party[13] is a contract by which the

[11] See next section.

[12] Bills of lading are sometimes given by carriers on land, particularly railroads.

[13] *Carta partita;* because formerly two copies were written on a single piece of parchment and then cut apart.

charterer hires the whole ship or her whole carrying capacity. The agreement may amount to a lease of the ship, whereby the charterer gets possession of her and steps into the place of the owner for the time being, the master and crew becoming his servants, so that if he receives the goods of other persons for carriage he rather than the owners is responsible as a carrier; or it may be merely a contract for the carriage of his goods, the owners remaining in possession and having the liability of carriers. Which it shall be depends upon the intention of the parties as expressed in the instrument.

Possession of the ship.

844. A bill of lading is usually given by the master, but sometimes by the owner or his agent on shore. It has a double character: (1) as a receipt, whereby the carrier acknowledges that he has received the goods for carriage; (2) as a contract, whereby the carrier agrees to carry the goods to the place and deliver them to the consignee designated in the bill. The goods are usually made deliverable to the person named or his order, in which case the bill may be transferred by indorsement and delivery, and the carrier must deliver to the holder of the bill who presents it and demands the goods, unless he has notice that the holder has no right. But a bill of lading is not in the strict sense a negotiable instrument. It is said to be *quasi*-negotiable. Its indorsement and delivery are equivalent to the transfer of the possession of the goods, and the indorsee gets the same rights which he would get by such a transfer, that is, even though he is a *bona fide* purchaser for value he gets no greater rights than the transferer has.[14] Bills of lading are frequently drawn in sets like foreign bills of exchange. The ordinary forms of bills of lading

Bills of lading.

Indorsement.

Sets and parts.

[14] It is a very common practice for the seller of goods to draw a bill of exchange on the buyer for the price, take a bill of lading making the goods deliverable to his own order, attach the two bills together and present them through an agent, usually a bank to the buyer at the same time; so that the buyer can not have the bill of lading, and therefore can not get possession of the goods, unless he accepts or pays the draft. Often a bank discounts the draft for the seller, and takes an indorsement of the bill of lading to itself as security for the payment of the draft.

Limitations of carrier's liability.

contain stipulations limiting the carrier's liability for the goods. These are generally a part of the contract of affreightment, and are binding on the parties, so that carriers by sea are very seldom in fact subject to the strict common law liabilities of common carriers. When a certain form of bill of lading has been established by custom the carrier may refuse to receive goods on other terms, though in general a common carrier must accept all goods offered him and can not compel the shipper to enter into any special contract. When goods are delivered on board of a ship they are generally received by the mate whose special duty it is to attend to the reception of cargo. He gives a receipt for them known as a mate's receipt, which is surrendered to the master when the bill of lading is given.

Customary forms.

Mate's receipts.

Deviation.

845. In pursuing her voyage the ship ought to follow the shortest and most direct route usually taken by ships on the same voyage. Any voluntary and unnecessary departure from that course is called a deviation. But if a ship is driven out of her course by a storm or forced to leave it to escape capture or by any necessity or turns aside to rescue another vessel in distress, that is not a deviation. A deviation is wrongful, and makes the carrier absolutely responsible for any loss or damage to the goods caused by it or occurring during its continuance, and vitiates the insurance on the ship and cargo.

Port of distress.

846. A port where the ship puts in for necessary supplies or repairs or for safety from enemies, not being one of the ports intended to be visited in the course of her voyage, is called a port of distress or of necessity. If the ship is delayed at such a port, the master may retain the cargo for a reasonable term in the expectation of being able to complete the voyage. But if because the ship is disabled, or for any reason, it becomes impossible to proceed with the voyage, the master ought if possible to forward the cargo by another ship, unless the consignee consents to receive it at the place where the voyage actually ends. If the master can not forward the goods, he should store them in some proper place and use due diligence to notify the owners. In case of necessity, as has been explained, he may sell the cargo or the ship.

Master's duties

Freight *pro rata*.

Generally the contract of affreightment is not apportionable, and no freight at all is payable unless the entire carriage is performed and the goods arrive at their port of destination either in the original ship or in a substituted ship. But if the consignee consents to receive them at an intermediate port, he must pay freight *pro rata itineris* according to the distance that the goods have been carried.

Lay days and demurrage.

847. A charter-party usually provides that the vessel shall be ready to receive cargo and that cargo shall be put on board by a certain time and shall be delivered from the ship within a certain time after her arrival at the end of the voyage, and stipulates for compensation to be paid for delay. The days allowed for loading and discharging cargo are known as lay days; and the compensation agreed upon for detention beyond the lay days is called demurrage. Demurrage properly so called is payable only by virtue of an express contract. But when either party is guilty of wrongful delay, damages in the nature of demurrage may be recoverable without any express contract.

CHAPTER LV.

AGENCY.

Agents.

848. An agent is a person appointed to do some act or acts on behalf and in the place of another, who is called the principal. The agent represents his principal, so that his conduct in the execution of his agency is imputed to the principal.

Attorneys.

Attorneys are a species of agents. They are of two kinds, attorneys at law and attorneys in fact. The former are lawyers who act as agents for parties in legal proceedings.[1] An attorney in fact in the proper technical sense is an agent who is appointed by a deed to do such acts or such kinds of acts for the principal as are designated in the deed itself. The deed is called a power of attorney. But the name attorney is often loosely applied to any similar agent, even though his appointment is not by deed.

Proxies.

A proxy, like an attorney, is an agent appointed to do certain designated acts. Any attorney in fact might also be called a proxy, but the name is most commonly applied to agents appointed to vote in the place of their principals at corporate meetings. A written instrument by which such an agent is appointed is also known as a proxy or procuration.

Factors.

A factor, also called a commission merchant, is an agent to whom goods are consigned by the owner for sale, so that the agent has the possession of the goods which he sells. As a general rule if an agent who has possession of his principal's goods sells or otherwise disposes of them without authority from his principal, for instance if he wrongfully pledges or mortgages them to secure his own private debt, the transaction is void and the principal may retake the goods from any one to whom the agent has wrongfully transferred them. But in some of the United States and in England, by certain statutes known as the factors' acts, it has been enacted for the con-

The factor's acts.

[1] See § 164.

venience of trade that if a factor is entrusted by the owner of goods with the possession and apparent ownership of them or of documents of title such as warehouse receipts or bills of lading, any sale or pledge made by him to a *bona fide* taker for value is valid, even though the factor as between himself and his principal had no right to dispose of the goods in that manner or does so in direct and wilful disobedience to his principal's orders. A factor is usually paid by a commission in the form of a percentage on the price of the goods sold by him. He frequently, as soon as he receives the goods and before he has sold them, advances to the owner a part of the price, for the repayment of which with interest he has a common law lien on the goods and their proceeds.

Factor's lien.

Brokers.

A broker is an agent employed to buy or sell property without having the possession of it, or to go between the parties to a negotiation or bring them together. He is generally paid by a commission and seldom makes advances. By custom his commission is often payable by the seller, even though he is employed by the buyer. He may not receive commissions from both parties without the consent of both. To do so is a fraud on his part, and he must account to his employer for what he receives and forfeits all right to his commission. Certain kinds of property, such as stocks and grain, are usually sold in exchanges established for that purpose. These are private associations of brokers, and no one but a member of the exchange is permitted to buy or sell there.

Sales at exchanges.

Auctioneers.

An auctioneer is generally the agent of the owner of the goods sold, but for the purpose of making a note or memorandum of the sale as required by the statute of frauds, he is regarded as also the agent of the buyer, so that both parties are bound by the note.

Del credere agents.

A *del credere* agent is one who sells goods for his principal and agrees to become responsible to the principal for the payment of the price by the buyer, in return for which he commonly receives a larger commission than an ordinary factor or broker.

Appointment of agents.

849. As a general rule no particular form is necessary for the appointment of an agent. It need not be in writing nor even by express words, but may be by conduct showing

an intention to authorize the appointee to act as agent. A person may by his conduct estop himself to deny that another is his agent. Thus if a master permits his servant to order supplies for his house on his credit and pays the bills, thus leading the dealers to suppose that the servant is authorized to make such purchases for him, and afterwards the servant fraudulently orders similar goods from the same tradesman in the master's name for himself, the master may be bound to pay for them. But an agent to execute a deed must himself be appointed by deed; and in a few cases written appointment is required by statute, as in the case of a proxy to vote at a corporation meeting.

Agents to execute deeds.

Ratification.

850. If a person who actually has no authority assumes to act as agent for another, the latter may afterwards ratify the act, which has the same effect as if he had authorized it beforehand. *Omnis ratihibitio retrotrahitur et mandato æquiparatur.* But this only applies when the person doing the act professes to act as agent, and the principal is in existence and himself capable of doing it both at the time of the act and of the ratification. Thus a forged signature can not be ratified, because the forger does not profess to sign as agent, nor can a corporation ratify a contract made on its behalf by its promotors before it was formed, because at that time it had no existence. When a person ratifies an act done for him by another, he must ratify it in its entirety. He can not accept so much as is for his benefit and reject the rest. Thus if he ratifies a fraudulent contract, he so far adopts and ratifies the fraudulent acts by which it was procured that it can be rescinded against him because of the fraud as if he had himself been guilty of it; and if he knows of the fraud when he ratifies, he is personally liable for it. He can not accept the contract and exclude the fraudulent element.

General and special agents.

851. A general agent in one who is "employed is a position or business of a generally recognized character, the extent of authority being apparent from the nature of the employment," such as a factor, a broker or the general manager of a company, while a particular or special agent is "appointed for a particular occasion or purpose, not involving any apparent

authority beyond that specially given by the appointment," as for instance an agent appointed by power of attorney to execute a deed.[2]

Agent should act in principal's name.

852. An agent in acting for his principal ought regularly to act in his principal's name. If he signs a document, he should not sign his own name, but the principal's name, adding that it is done by him as agent or attorney. In deeds the rule is strict that only the persons named in the deed as parties are parties to it, so that if A executes a deed in his own name describing himself in the deed as agent of B and declaring that he makes it on B's behalf, it is the deed of A only, not of B, the word agent being merely *descriptio personæ*.[3] In other cases if the agent acts in his own name, it is a question of the intention of the parties whether the act is that of the agent himself or of the principal. If an agent buys goods for a foreign principal, the *prima facie* presumption, by mercantile custom, is that he intends to bind himself personally and not his principal for the price. If the agent in doing any juristic act for his principal does not disclose the fact of his agency but acts as if he were himself the principal, or while professing to act as agent does not disclose the name of his principal, as is often the case with a factor, the general rule is that the act is that both of himself and the principal, and the undisclosed principal may sue or be sued on any agreement so made by his agent. But if the principal sues, the other party may make any defence against him which he could against the agent. For instance, if the agent has sold his principal's goods in his own name to a person to whom he is himself indebted, and the principal sues the buyer for the price, the latter may set off the debt which the agent owes him.

Execution of deeds by agents

Acts of agent in his own name.

Foreign principal.

Undisclosed principal.

Agent's implied warranty of authority.

853. A person who assumes to act as agent impliedly warrants to the other party to the transaction that he has authority as agent to do the act on behalf of his principal. If it turns out that he has not, and the principal is not bound

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[2] Leake, Digest of the Law of Contracts, 473.

[3] This rule has been modified to some extent in the United States; the decisions are conflicting. In some states a deed in which a party was described as "A, agent for B," has been held to be the deed of B.

by the act and declines to ratify it, the agent is liable to the other party in an action for a breach of his warranty, even though he acted in good faith believing himself to have the authority which he professed to have. If the agent knowingly makes a false representation as to his authority, he may also be liable as for a fraud.

Delegation of authority.

854. As a general rule an agent can not transfer his authority to another person so as to make the latter agent in his place. *Delegatus non potest delegare.* But an agent may employ agents of his own, for whose conduct he may be responsible to his principal as for his own conduct. Also powers of attorney and written proxies often contain a power of substitution authorizing the agent to appoint another to act instead of himself. And such a power may be implied from the usage of business or the necessity of the case. Thus an agent employed to buy or sell stock, if he is not himself a member of the stock exchange, may usually employ a stockbroker, or a ship's husband may make use of the services of a shipbroker.

The agents acts and contracts as affecting the principle.

855. A principal has the benefit of and is bound by all agreements made and juristic acts done for him by the agent within the scope of the authority which he has expressly or impliedly conferred upon the latter, but not agreements or acts in excess of that authority. In the case of a general agent his implied authority includes such powers and authority as such agents generally have. Thus a factor may sell upon the usual terms of credit or a broker according to the usage of the trade or business in which he is employed. As a general rule the agent himself is not a party to an agreement which he makes for his principal, is not bound by it and can not sue upon it. It is the principal's act, not the agent's.

Implied authority of agent.

The agent is not bound by agreements.

Powers and instructions.

There is a distinction between the powers of an agent and the instructions given him by his principal as to how he shall use those powers. The agent ought to obey his principal's instructions. But if he disobeys them and does some act which the principal has forbidden him to do, the principal may nevertheless be bound by the act, provided it is within the scope of the agent's authority, and the other party to the transaction relies upon the authority and does not know that the agent

is acting contrary to his principal's orders; for if he does know, he is guilty of fraud and can not acquire any rights by his own wrong. Thus if goods are consigned to a factor for sale with instructions not to sell below a certain price, a sale by him for a less price will be valid as being within the implied powers of a factor. So if A gives B a power of attorney to make a mortgage of his land, and the power is in fact given only for the purpose of securing a loan which B is to procure for A, but the power does not specify the purpose for which it is given but appears on its face to be a general authority to mortgage, B's authority as agent is fixed by the terms of the deed; and if he in violation of his principal's orders, makes a mortgage for a different purpose to a person who knows the contents of the power and trusts to the authority therein conferred and has no notice of the purpose for which it was given, the mortgage is binding upon A.

The principal's liability for the agent's torts.

In general the principal is responsible for torts committed by his agent in the course of his acting as such. Thus a principal may be sued for a fraud of his agent in making a contract; or if the agent, intending to take possession of his principal's goods for the pnrposes of the agency, by mistake takes the goods of a third person, the principal is liable. The law on this point is the same as in the case of master and servant, which will be explained in another place.[4]

Duties of the agent to his principal.

856. An agent is a bailee of services, and owes to his principal the duty in § 813. There is usually also an express or implied contract on his part to use due care and skill about the principal's business. He is bound to obey the principal's lawful orders, and is liable in damages if he does not. Whether or not he is entitled to compensation for his services depends upon the contract between him and his principal, or upon the existence of an obligation of the sort mentioned in § 758 arising from the acceptance of his services by the principal; otherwise he has no such right in general, but a contract may be implied from usage or the nature of his business.

Agent's right to compensation.

[4] See § 1005, 1006.

Agent's right to re-imbursement.

The agent also has generally a right, either by an express or implied contract or by a non-contractual obligation arising from the rendering of services or as a meritorious obligation, to be reimbursed by the principal for all expenses properly incurred by him for the latter in the course of his agency.

Revocation of agent's authority.

857. The agent's authority is in the nature of a license to act for his principal, and like licenses generally is revocable at the principal's pleasure, unless coupled with an interest. But

Notice to third persons.

it may be necessary for the principal to give notice to persons with whom the agent has been in the habit of dealing of the revocation; otherwise if the agent goes on dealing with them in the principal's name, the principal may be estopped to deny the continuance of the agency. Thus if a master has been in the habit of buying goods on credit from a particular tradesman through his servant, and discharges the servant, he ought to inform the tradesman of that fact. If he does not, he may

Revocation by death.

have to pay for goods that the servant afterwards buys. The agency is also terminated by the death of either the principal or the agent.

CHAPTER LVI.

PARTNERSHIP

858. "Partnership is the relation which subsists between persons who have agreed to combine their property, labor or skill in some business, and to share the profits between them," provided the association is not incorporated. The partnership is also called a firm. The agreement need not be in writing, though it usually is. There is no provision in England or the United States for the registration of partnerships, as in Germany, Japan and some other countries. Partnership. Form of the contract.

It was formerly held as law in England, and probably still is so in most of the United States, that every association for the purpose of making and sharing profits, whether of a continuous business or of a single adventure or transaction, if not a corporation, must necessarily be a partnership and impose upon each of the associates all the liabilities of a partner, the most important of which is an unlimited liability for all debts incurred in the business, notwithstanding the parties did not know that their association amounted to a partnership and even though they intended and expressly declared that it should not be one. That is, if parties enter into an association that in fact has the attributes of a partnership, it is a partnership, whatever they may choose to call it This renders it very difficult, and in most cases impossible, for a firm to hire a clerk, agent or servant, and for the sake of stimulating him to zeal and fidelity make his pay depend upon the profits of the business, without involving him in the responsibilities of a partner. That sort of compulsory or involuntary partnership, however, is only for the benefit of third persons, as to them the associates are liable as partners But as between themselves their rights and duties are such as are declared by their agree- Agreements for sharing profits. Partnership as to third persons.

[1] Indian Contract Act § 239

ment; so that though a clerk or servant hired in the manner just mentioned might be responsible to creditors of the firm as a partner, he would have a right to be indemnified by his employers for the entire amount he was thus compelled to pay, which is different from the right of one partner against another. But by a case decided in the House of Lords in 1860 it was settled that the law was different in England, and that whether a person who was employed in a business and paid by a share of the profits was a partner or not depended upon the intention of the parties, though the *prima facie* presumption is that he is a partner. This rule has been adopted in the recent English partnership act. In both countries also statutes have been passed to enable a person to furnish money to a trader or a firm, or to be employed by him or it and receive compensation out of the profits, under certain conditions without becoming liable as a partner.

Furnishing money to partnerships.

In the United States such an advance of money must usually be by means of what is called a special or limited partnership. The person advancing the money becomes a special partner, and receives a share of the profits in return for the use of the money, but is not personally liable for the debts of the firm, though of course he takes the risk of losing the money which he puts in. To prevent frauds on persons who might be induced to deal with the firm on the credit of the special partner, it is provided that his name shall not appear in the firm name and that the partnership agreement shall be in writing and be filed in some designated public office where any one may inspect it.

Special or limited partnerships.

Profits and gross receipts.

Profits are the gains or net receipts of a business after deducting its expenses. They differ therefore from the gross receipts or total income of the business, out of which expenses are still to be paid or deducted. An agreement to share the gross receipts of a business is not a partnership, as for instance if an agent is paid by a commission on the money received for goods sold by him, or the proprietor of a theatre lets it to the manager of a theatrical troupe and receives a part of the admission fees in lieu of rent.

Agreements to share gross receipts.

The firm name.

859. A partnership usually, but not always, has a distinctive firm name, which may contain the names of some or all of the individual partners or may be arbitrarily chosen. A firm name resembles a trade-mark and is subject to nearly the same rules.

Partnership property and liabilities.

860. A partnership, unlike a corporation, is not an artificial person distinct from the individuals who compose it. It can not therefore as a person hold property, make contracts, be guilty of wrongs, sue or be sued. Its rights, duties and liabilities pertain to the partners as individuals Personal property of the firm belongs to the partners jointly. But by the mercantile law the right of survivorship,[2] which existed at common law as to joint property generally, did not obtain among partners, but on the death of a partner his personal representative became owner in common with the surviving partners. *Jus accrescendi inter mercatores locum non habet.* Real property held for partnership use may be held by the partners in joint tenancy, but for convenience's sake it is often vested in one or more of the partners as trustees for the firm. Debts due to or from the partnership are joint at law, and on the death of one partner survive to or against the others. But when the survivors receive payment they must account to the representatives of the deceased for his share, and if they pay a debt due from the firm they are entitled to contribution from his estate In equity debts against a firm are regarded as joint and several, and firm creditors may proceed directly against the estate of a deceased partner. On all claims against the firm each partner is personally and unlimitedly responsible; but if any one pays more than his just proportion, the others must reimburse him.

Personal property.

Real property

Debts.

Responsibility of partners.

Suits by and against the firm.

861. Suits by or against the partnership must be brought by or against all the individual partners jointly, as if no partnership existed. If a judgment is rendered against them, either the partnership property or the private property of any partner may be seized to satisfy the judgment, as in the case of ordinary joint debtors. And if a creditor of one partner sues him for a debt of his own and gets judgment, he may

[2] See § 259.

seize the partnership property just as he might any other property in which his debtor had an interest. But by such a seizure the private creditor gets only the interest of his debtor in the property subject to all the legal and equitable rights of the other partners and of the creditors of the firm, as will be presently explained.[3] In some places by statute a partnership is at present for convenience's sake permitted to sue and be sued in its firm name, and on a judgment against it in such a suit the private property of a partner usually can not be seized without farther proceedings being had to obtain a judgment against him personally.

Suits in the firm name.

The partners' interests.

862. Although so far as legal ownership of the partnership assets and legal responsibility for its debts go, the partners stand simply as joint owners, joint creditors and joint debtors, yet as between themselves their actual interests in the partnership may be very different. A partner's interest is only the value of what would come to him if the partnership were settled up, all debts and claims against it paid, and the residue distributed among the partners according to the terms of the partnership agreement, allowing for any indebtedness that may exist from him to the firm, as when for instance he has already drawn out more than his share of the profits, or from the firm to him, as when he has paid claims against the firm out of his own property *Prima facie* and unless the partnership agreement provides otherwise, the interests of the partners in the firm are equal, and they share profits and losses equally. But a different agreement may be made.

Duties and rights of partners *inter se*.

Fiduciary relation.

863. Unless there is an agreement to the contrary, each partner must use due diligence in attending to the business of the partnership, and has equal powers and rights with the others in the management of the business. In case of a difference of opinion, the majority must decide. Partners occupy a fiduciary relation as to each other. Each is entitled to full information from the others as to the partnership affairs, and no one is permitted to make any secret gain to himself out of the partnership business or property or by carrying on a business in competition

[3] See next section.

with the firm. If he does, he must account for it to the firm. The same principles apply here as in the case of trustees.[4]

Change of partners.

A share in a partnership is not transferable. No new partner can be admitted without the consent of all. If a new partner is admitted, he does not become liable for existing debts or claims against the firm, and a partner who retires from a firm does not thereby free himself from such liability. But when a partner goes out and a new one comes in in his place a novation[5] of a firm debt may be made with the creditor's consent, the retiring partner being discharged and the new comer stepping into his place as debtor.

Novation.

Authority to act for the firm.

As a general rule each partner has authority to act for the firm in the transaction of its business, and his acts and agreements are binding upon the other partners. It is often said that each is agent for the others. The partners may by agreement among themselves limit the powers of some one or more of their number, for instance by a stipulation in the partnership articles that no partner shall execute any negotiable instrument in the name of the firm, or may even provide that the management of the business or of certain branches of it shall be entirely in the hands of some partners to the exclusion of the others. Such agreements are binding among the partners themselves, and any partner who violated the agreement might be liable in damages to his co-partners. But as to outsiders they are rather in the nature of instructions given to agents than limitations on their powers.[6] They do not prevent the partnership from being bound to persons who deal with a partner, in matters relating to the partnership business and in which a partner would ordinarily have power to act for the firm, knowing him to be a partner but having no notice of his want of authority. The liability of partners for each other's torts depends upon the ordinary rules of agency.

Limitations on partners' authority.

Torts.

Dissolution of partnership.

864. A partnership may be dissolved without a decree of a court; by the expiration of the time for which it was constituted; by mutual consent; by a notification by any one partner to the others that it is dissolved, if the partnership

[4] See § 784. See § 770. [6] See § 855.

was not constituted for any fixed time, but if the partnership agreement has fixed the duration of the partnership, one partner can not dissolve it or withdraw from it without the consent of the others, unless the right to do so is reserved in the agreement; by the death of one partner; by the alienation of one partner's interest by operation of law, as in the case of bankruptcy.

Dissolution by decree of a court.

The dissolution of a partnership may be decreed by a court of equity; if one partner becomes insane or in any way incapable of performing his part of the contract, or liable to a criminal prosecution, or so conducts himself that it becomes not reasonably practicable for the other partners to carry on business with him, or assigns or incumbers his interest in the firm; or if the business of the partnership can not be carried on except at a loss.

Liquidation.

865. On dissolution it is usual for the partners or the court to appoint some one, generally one or more of the partners, to wind up and settle its affairs. If that is not done, the former partners continue to have the powers of partners so far as is necessary for that purpose, but not for engaging in new business. The assets of the firm must be disposed of, its debts paid, what is left, if anything, of the assets distributed among the partners, and all debts and claims of the partners among themselves adjusted and settled.

Liquidation at law.

If the firm and all the individual partners are solvent, the rights and claims to be taken account of in the liquidation are generally legal ones only, and it is usually not necessary to resort to a court of equity for assistance, unless disputes arise necessitating the taking of a general account between the partners, which can be done more conveniently in equity than at law. The obligations which the partners owe to each other and to the firm creditors, and even those between surviving partners and the representatives of a deceased partner, are legal debts, not trusts.

Liquidation in equity.

But in case of the insolvency of the firm or any of the partners, as in other cases where the assets of an insolvent are to be administered, certain equitable claims and preferences arise, and equity interferes to marshal the assets[7] and effect an

[7] See § 674.

equitable distribution. In equity and in bankruptcy the creditors of the firm are entitled to be paid out of the firm property in preference to the creditors of the individual partners; only what is left of the partnership assets after its creditors have been paid in full can go to the private creditors. And the latter in like manner have a prior claim against the separate property of the partners. Neither class of creditors will be permitted to enforce judgments obtained by them at law so as to interfere with such preferences.

Marshaling of assets between individual and firm creditors.

866. A joint stock company, often called simply a company, in England is a peculiar kind of a partnership, usually composed of a large number of persons, the interest of the partners in which is called stock and is divided into transferable shares, as in a corporation, and whose affairs are managed, like those of a corporation, by a board of directors and elected officers. It can hold property which is separate from that of its members, and can make contracts and sue and be sued in its company name as if it were an artificial person, though legally it is not regarded as a corporation. The liability of its stockholders for its debts may be unlimited, like that of ordinary partners, or may be limited to the value of their shares.[8] If the latter is the case, the company's name must contain the word "Limited," so that persons who have dealings with it may be informed of the fact. In a few of the United States such companies may exist, but they are not common. Generally in the United States the name joint stock company denotes a kind of corporation.[9]

Joint stock companies.

Limited and unlimited companies.

In the United States.

[8] See § 1025.

[9] See § 1025.

SUBDIVISION III. WRONGS.

CHAPTER LVII.

CIVIL INJURIES.

Elements of a civil injury.

867. To constitute a civil injury both a breach of duty and a violation of right are necessary.[1] This is usually, but less correctly, expressed by saying that there must be both wrong and damage, *injuria et damnum*. Mere violation of right or damage not due to a breach of duty is called *damnum absque injuria*, and no action will lie for it, as where property is damaged by a nuisance which is authorized by the legislature, or a person is subjected to pecuniary loss by business competition. But any violation of right, however trifling, if the consequence of the breach of a corresponding duty, is a wrong; the extent of the violation is of no importance on the question of the existence of a wrong, though it may be of the utmost importance as to the amount of damages that can be recovered in an action for the wrong. It is just as wrongful to tap a man lightly with a switch as to knock him down with a club.

Connection between breach of duty and violation of right.

The violation of right must actually be the consequence of the breach of duty. If it would have happened equally had there been no breach of duty, there is no wrong. This principle is of frequent application in cases of alleged fraudulent misrepresentation. It has already been explained that an intent to defraud includes an intent that the false representation shall be believed and acted upon; so much is essential to the breach of duty. But to the actual commission of a fraud it is also necessary that it be in fact believed and acted upon, otherwise the false representation does not become the cause of any damage.

Plurality of causes.

It is not necessary however that the breach of duty be the sole cause of the violation of right; it is enough if it be one of a number of concurring causes, provided that without it the

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[1] See § 279.

violation of right would not have happened. Thus if A wrongfully places an obstruction in a stream, and then B wrongfully turns into the stream more water than in its obstructed condition it can carry off, and as a consequence of the two acts the water is set back upon and floods C's land, though that would not have happened as a result of either of the acts alone, A and B are each guilty of a tort and liable to C for the entire damage. So if a passenger on a ship is hurt in a collision with another vessel due to the combined negligence of the masters of both, each master is responsible for the injury.

Effect of subsequent events.

If a wrong has once been completely committed, nothing that happens afterwards will affect its character as a wrong. Thus if goods are tortiously taken and afterwards, before any action is brought, restored to the owner, that does not purge the wrong nor take away the right of action; though it will reduce, or in technical language mitigate, the damages recoverable. A warehouseman who has goods on storage is liable to the owner for a negligent injury to them, although after the injury they are totally destroyed by accidental fire without the warehouseman's fault, so that the owner would have lost his goods in any event and the first injury has really done him no harm.

The correspondence of the duty and the right.

868. To make a wrong the duty broken and the right violated must correspond to each other. If a breach of duty is followed only by the violation of a right to which that particular duty does not correspond, there is no wrong. Thus where the plaintiff had contracted with a township to board all its paupers and supply them with necessaries for a gross sum *per annum*, and the defendant beat one of the paupers, in consequence of which he became sick and the plaintiff was put to expense in taking care of him, it was held that no action lay by the plaintiff against the defendant. The duty broken was that in § 690, which corresponds to rights of bodily security. But the plaintiff had no right in the bodily security of the pauper. The only right of the plaintiff which was violated was that of pecuniary condition, to which that duty does not correspond. Had the person beaten been the plaintiff's wife or child, in whose bodily security he had rights,[2] he could have

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[2] See §§ 981, 988.

recovered; and so he could if the defendant had done the act with a malicious intention to put the plaintiff to expense, thus breaking the duty in § 720, which does correspond to the right of pecuniary condition For the same reason a life insurance company can not have an action against a person who kills one of its policy holders.

Joint torts.

869. If several persons commit a tort jointly, they are jointly and severally responsible for it. That is, they may be sued jointly in a single suit, or separate actions may be brought against them and judgments got against each one for the entire wrong. But the injured party can have but one satisfaction. If one tort-feasor pays the sum awarded as damages, no suit can thereafter be brought against any of the others; and no suit then pending against the others can proceed and no judgment obtained against any of them can be enforced, except for the costs of the proceeding.[3]

Joint breaches of trust.

This principle applies to breaches of trust by joint trustees, as a general rule, so far as each is to blame in any way for the breach of trust or has consented to it. But generally one trustee is not responsible for a breach of trust committed by a co-trustee without his consent or connivance and for which he is in fact free from blame.

Malfeasance, misfeasance and nonfeasance.

870. Wrongful conduct is divided into malfeasance, misfeasance and nonfeasance. Malfeasance means an act which is in itself unlawful without regard to the manner in which it is done, such as beating a person or taking his property without legal justification. Misfeasance means doing a lawful act, *i.e.* an act which would be lawful if done properly, in an improper manner,[4] *e.g.* making an excavation on the edge of one's own land without taking proper precautions to prevent adjacent land from caving in, or navigating a ship in a careless and unskilful manner in a crowded channel. Nonfeasance is mere omission, *e.g.* not paying a debt.

Continuing wrongs.

871. When as the direct consequence of an unlawful act a thing is placed where its mere presence violates a right, and continues there, as for instance if A wrongfully builds a house or places stones or rubbish on B's land, the act itself is deemed to

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[3] See § 760 *ad fin.*

[4] See § 695.

continue, the wrong is called a continuing wrong, and each day's continuance is a separate wrong for which a separate action will lie. Thus in the example just given B may have a fresh action against A every day that the nuisance remains upon his land; the act of placing it there is considered to be done or repeated each day. But if on any day he omits to begin a suit and afterwards does sue, he must treat the whole continuance of the injury up to the time of suing as a single wrong, except so much of it as he has already begun suit for.

CHAPTER LVIII.

PARTICULAR WRONGS.

Specific wrongs.

872. Certain kinds, but not all kinds, of civil injuries have received specific names. The distinctions between these depend sometimes upon the rights and duties which are violated. If this were always the case, no description of the wrongs separate from that of the rights and duties themselves would be necessary. But very often the ground of the classification is the presence of other elements, so that violations of the same right and duty may constitute different kinds of wrongs, or violations of different rights and duties be put together under the same name. To a considerable extent the grouping has been determined by historical accidents, and particularly by the ancient forms of procedure at law, and so far forth is devoid of any scientific or logical basis.

Classification of injuries.

Injuries may be divided into injuries to the person, to land, to incorporeal things, to personal property, to pecuniary condition, and to obligations. Those divisions are not quite mutually exclusive, but overlap upon each other to some extent. There is one species of wrong, however, known as trespass, which falls into several of those classes, and therefore, as being of a somewhat general character, will be first discussed.

Trespass.

873. A trespass is a direct and forcible injury to the person or to tangible property. The right violated is the right of bodily

The Right violated.

security, the right of mental security mentioned in § 421, or some property right in land or chattels which includes the right of present possession. No injury to property is a trespass as against a person who has not the right of present possession, and no such person can sue as for a trespass. Thus if A is tenant for years of land and B the reversioner, and C wrongfully enters upon the land and tears down a house, or if A has hired B's horse for a month, and C wrongfully kills it, C's act is a tort against both A and B, but a trespass against

A only. It is not a trespass against B, because he has not the right of present possession. Also a person can not commit a trespass upon property which he has in his own possession, even though his possession is wrongful and the owner has a right of present possession. If a thief steals a chattel and then destroys it, the original theft was a trespass, but not the destruction. The duty which is broken in a trespass is the one in § 690, or § 691. The meaning of a direct injury has been already explained.[1] Force in this connection does not mean actual violence. It means merely what is stated in the definition of the duties, that the wrong must be committed by an act, not by a mere omission, and that the violation of the right must be effected by means of physical contact or, when the right is that of mental security, by an apparent attempt to produce such a contact immediately. Striking a person or attempting to do so, entering upon land, taking or forcibly and directly injuring a chattel, if wrongful, is a trespass; but poisoning a person's cattle, negligently keeping gunpowder so that it explodes and does damage, making a nuisance by smells or slandering a person is not, the injury being either indirect or not forcible. The wrongful entry of cattle upon land, though it may be in fact the indirect consequence of a mere omission on the part the person in charge of them, is reckoned a trespass, the act of the cattle being imputed to their possessor. There is a like imputation if a man intentionally sets his dog on to bite a person; but injuries by ferocious animals generally are not trespasses, being regarded merely as indirect consequences of their possessors' omission to restrain them.

The duty broken.

Direct damage.

Force.

Injuries by animals.

874. Coming now to wrongs especially against the person; a trespass involving a violation of the right of bodily security, such as striking a person or even wrongfully touching him, is known as a battery; and one which consists in an attempt to commit a battery, in violation of the right of mental security and of the duty in § 691, is an assault. Since every battery includes an assault, the compound name assault and battery is often used.

Injuries to the person.

Battery

Assault.

As has been already said, any violation of the right of liberty is an imprisonment; if wrongful, it is called false imprisonment.

False imprisonment.

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[1] See § 234.

False imprisonment, when it takes place under the mandate of a court, must be distinguished from malicious prosecution or abuse of process, which are separate wrongs. In false imprisonment the imprisonment itself is wrongful. But imprisonment pursuant to a mandate of a court is wrongful only if the mandate is void or is afterwards set aside for irregularity. If A institutes a prosecution against B on a false charge of crime, and a magistrate on A's complaint issues a warrant for B's arrest, the fact that B is innocent and the prosecution groundless does not make the warrant void or irregular; it is merely erroneous, and the arrest and consequent imprisonment are lawful. If A has made the charge maliciously and without probable cause he may be guilty of a malicious prosecution, but not of false imprisonment. For an innocent man to be arrested and tried for a crime is indeed a great hardship; but the administration of criminal justice could not go on if he were permitted to treat the prosecution when instituted in good faith as a tort against him.

Slander and libel.

The wrongs known as slander and libel, which involve violations of the right of reputation, have been already described.

Scandalum magnatum.

Scandal against judges, high public officers and in England noblemen is called *scandalum magnatum*, and in this class of cases derogatory words may be actionable which would not be if spoken of a common person.

Jactitation of marriage.

Jactitation of marriage is where one person falsely and maliciously boasts or gives out that he or she is married to another, whereby a common reputation of their matrimony may ensue. It is a wrong under the ecclesiastical law.

Seduction.

Seduction[2] is the having illicit sexual intercourse with a woman with her consent in violation of the rights of her husband or master.[3] It is not a wrong against the woman herself, because of her consent, unless she is so young as to be legally incapable of consenting.[4]

Adultery.

Having illicit intercourse with a married woman in violation of her husband's right is called also adultery or criminal conversation.[5]

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[2] For the meaning of seduction in the criminal law see § 1167.

[3] These rights belong to the law of abnormal persons.

[4] A certain age, usually from twelve to sixteen, is in most places fixed by statute, under which a girl is deemed incapable of consenting.

[5] Usually written crim. con.

Abduction is taking a wife from her husband's custody in violation of his rights, or a child, ward or apprentice from that of his parent, guardian or master. Abduction.

875. Of injuries to land the most important is ouster, which consists in wrongfully taking or keeping possession of land and excluding the rightful tenant. A mere wrongful entry upon or meddling with land which does not involve taking possession of it is not an ouster but a trespass. The original entry by which an ouster is accomplished is usually a trespass, but the continuance of the wrongful possession is not, because the intruder gets by his ouster an estate in the land. But when the rightful tenant has recovered the land by re-entry or action, and thus put an end to the defeasible estate of the wrong-doer, he is then, as has been explained already, "in of his old right," and may treat the intruder as a trespasser in respect of his possession and all acts done by him upon the land. Ouster.

There were at common law several different kinds of ouster. Abatement was where, after the death of a tenant in fee and before the heir or devisee had acquired seizin by entry, a stranger took possession of the land. Intrusion resembled abatement except that it took place after the termination of a particular estate and before the entry of the remainderman or reversioner. Abatement and intrusion are now impossible, because neither the heir, the devisee nor the tenant in expectancy is required to make entry to get his seizin, but is considered to be seized in law as soon as his right accrues. Abatement. Intrusion.

Disseizin is where, the lawful tenant being seized, the wrong-doer enters and turns him out. This may happen at the present time. An ouster which at common law would have been an abatement or intrusion will now be a disseizin. Disseizin may be of incorporeal hereditaments; in which case it can not be an actual dispossession, because these thing are incapable of being possessed in the proper sense, but it depends upon the nature of the right, being generally some sort of disturbance of the owner in his means of coming at or enjoying the subject of the right. But all disseizins of incorporeal things are only so at the election of the disseizee; that is, only if he chooses to acknowledge himself to be disseized for the sake Disseizin. Of incorporeal hereditaments.

of using certain forms of remedy provided especially for cases of disseizin.[6] But as these remedies are now entirely obsolete, such theoretical disseizin is of no importance. In the above three kinds of ouster the original entry was unlawful. But in other cases the entry might have been at first lawful, but the subsequent possession wrongful.

Discontinuance.

Discontinuance is where a tenant in possession, who actually has an estate in the land which he can lawfully convey to another, attempts to convey a larger estate than he ought, by a conveyance which operates at common law and not under the statute of uses, *i.e.* by a tortious conveyance;[7] for example, if a tenant in tail should make a conveyance in fee simple by feoffment with livery of seizin. The possession of the new tenant under the conveyance is rightful[8] for so long a time as the former tenant might have lawfully granted it, but after that it becomes a wrongful ouster of the true tenant. Discontinuance is at present impossible, because all conveyance are deemed innocent, so that such an ouster would be now a disseizin or deforcement.

Deforcement.

Deforcement is a general name comprehending all the above mentioned kinds of ouster. But in a narrower sense it denotes any withholding of the freehold from one who has a right to it but who has never had possession, which is not comprised under any of the other names, *e.g.* if one coparcenor takes exclusive possession and keeps out the other, if the heir takes possession of land and will not assign the widow of the former tenant the one third to which she is entitled as dower, or if the tenant covenants to convey his estate to another and refuses to do so.[9] So keeping a man out of an office which is freehold property is called a deforcement.

Ouster of chattels real.

An ouster may also be committed of chattels real; but wrongfully dispossessing the owner of a chattel personal is not an ouster.

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[6] See § 906.

[7] See § 583.

[8] Though it was formerly subject to forfeiture; see § 583.

[9] Hence a person who levies a fine is called a deforciant. See § 597.

Spoliation resembles ouster, and is where a clerk or incumbent takes the profits of an ecclesiastical benefice without right under a false claim of title. Spoliation.

876. Waste is also a species of injury to land of which enough has been said elsewhere. Dilapidation is a kind of ecclesiastical waste, where the incumbent of a living commits voluntary or permissive waste upon the property attached to the living, as by pulling down the parsonage house or cutting timber upon the glebe land. Waste. Dilapidation.

877. Nuisance, in the sense of a wrong,[10] is any wrong committed by the instrumentality of a thing which is a nuisance, and by a breach of one of the duties specially relating to such things. When a nuisance involves a violation of the rights of the whole community it is called a public nuisance, as in the case of an obstruction placed in a highway or navigable river. When only the rights of a single person or a limited number of persons are violated, the nuisance is private. Nuisance. Public and private nuisances.

878. Subtraction is an injury to an incorporeal thing. It consists in omitting to perform any duty that corresponds to the right by reason of tenure, custom or prescription; such as the refusal of a feudal tenant to perform the services of his tenure or a refusal to pay rent service or tithes. If by ancient custom all persons living in a certain locality are bound to have their corn ground at a particular mill, it is a subtraction to take it elsewhere to be ground. But a refusal to perform a contract is not a subtraction. Subtraction.

Disturbance is any wrongful violation of an incorporeal hereditament. Thus a refusal to pay tolls is a disturbance of the franchise to take tolls, the putting in cattle by one who has no right of common, or the putting in of non-commonable beasts by any one, is a disturbance of a right of common; and so is the putting in by a commoner of more cattle than his right allows, which last is called a surcharging of the common. Wrongfully enclosing a common and so excluding the commoners' cattle, driving them off, plowing up the ground, and many other acts of the like nature are also disturbances of commons. An unlawful obstruction of a way is a disturbance of the right of way. To Disturbance.

[10] See § 705.

induce by fraud or force or any unlawful means a man's tenants to leave him is a disturbance of his tenure or his right as a landlord. Unlawfully setting up a market or ferry, and thus drawing custom away from a legally established market or ferry, is a disturbance of the franchise of the latter. Various interferences with the rights of the holder of an advowson are reckoned among disturbances, for instance the presentation by an unauthorized person of a clerk for institution, or the refusal of the bishop without sufficient reason to admit the patron's nominee. A usurpation however is more than a disturbance. This happens where a stranger presents a clerk and he is actually admitted and instituted, and thus becomes the *de facto* holder of the benefice. The effect of this is similar to that of a disseizin. The rightful patron is ousted from the entire advowson, and can not appoint in case a vacancy occurs, unless he has in the mean time got back his right by proper proceedings.

Usurpation.

Infringements of patents, etc.

Infringements of patents, copyrights and trademarks resemble disturbance. These, especially violations of copyrights, are colloquially, and at present even occasionally in legal language, called piracy.

Injuries to chattels.

879. Among injuries to chattels is rescous or rescue, which is where, goods having been lawfully seized for a distress or under the mandate of a court, by which seizure a kind of limited property right is acquired, they are forcibly retaken from the officer or person holding them by virtue of the seizure. When cattle are distrained damage feasant and impounded, a rescue of them from the pound is called pound-breach.

Rescue.

Pound-breach.

Conversion.

880. The conversion of a chattel is one of the most frequent and important wrongs against property. It meant originally that a person who had found a lost chattel and taken it into his possession refused upon demand to restore it to the owner and appropriated or converted it to his own use. But for certain reasons which will be explained hereafter[11] it was found convenient to extend the notion of conversion and to make it cover as much ground as possible. Consequently it now includes various kinds of unlawful dealings with chattels which are hardly capable

[11] See § 925.

of being brought under a single definition By way of illustration, holding possession of a chattel obtained by an unlawful taking, the refusal of a bailee to restore the chattel at the end of the bailment, or the sale and delivery of it by him to a stranger, is a conversion.

The right violated.

The right which is violated in a conversion, as in a trespass, is a right of property which includes a right of present possession. No one, even though he be the owner of the chattel, can sue for a conversion of it unless at the time of the wrong he had the right of present possession; but on the other hand a mere bailee who has that right may sue.[12] The principle however applies here that a wilful abuse of the chattel by a bailee terminates the bailment and revests the right of present possession in the bailor at the latter's option.[13]

Deprivation of possession.

But not every violation of the right of present possession is a conversion. The wrongful dealing with the chattel must be such as is inconsistent with the existence of the owner's possession, such as a taking the chattel from him, its destruction, its retention in the possession of the wrongdoer or its delivery by him to a third person. No sort of wrongful interference with a chattel which leaves it in the possession of the owner is a conversion of it. Thus where the defendant had a herd of swine of a superior breed which he kept in a pasture, and he caught and castrated a scrub boar of the plaintiff's which he found running with his herd, the court said that the act, though a trespass, was not a conversion of the boar, the defendant having taken no possession of it. So if a landlord intending to distrain upon his tenant's goods, forcibly prevents him from removing them from the premises, that is not a conversion of the goods because the tenant remains in possession of them.

Intention.

In order to amount to a conversion the wrong must be intentional. If a bailee intentionally destroys the chattel, he is guilty of a conversion, and so he is if he intentionally keeps possession after his right has come to an end; but not if it

[12] There is some authority for saying that he must have not merely a precarious possession but a special property; but probably that view is incorrect.

[13] See § 802.

is destroyed by his negligence merely, or if his failure to restore it is through forgetfulness. It is often said that conversion includes or implies some assertion by the wrongdoer of dominion over the chattel; but this seems to mean no more than that the wrongful dealing with it must be intentional and inconsistent with the owner's possession. Intention here means simple intention only. If a carrier delivers the goods entrusted to him to the wrong person, even by an innocent mistake on his part and after the use by him of the utmost care to find out the person to whom delivery ought to be made, he is guilty of a conversion; and so is a person who by mistake takes and uses another's goods supposing them to be his own.

Kinds of conversion.

881. Subject to the foregoing general requirements, there seem to be three sorts of wrongful dealings with chattels which amount to conversion. (1) Wrongfully taking or holding possession of a chattel, where the duty broken is usually the general duty as to possession in § 693 or perhaps the duty in § 800. (2) Wrongful delivery of a chattel by the possessor to a third person, as where a carrier or warehouseman makes a misdelivery or the bailee of a chattel sells it and delivers it to the buyer. Here the duty broken is usually the general duty as to intentional wrongs in § 718. In this class of cases the deliveree, if he takes the chattel in good faith, may acquire a rightful possession.[14] (3) Any use of or dealing with a chattel by the possessor of it in excess of his rights of use. This case might perhaps be considered to include the preceding one, and usually involves a breach of the same duty.[15] This includes the injury or destruction of the chattel by a bailee, and the frequently occurring case of hiring a chattel for one purpose and using it for another, *e.g.* driving a hired horse to a place other than that to which he was hired to go.

Wrongful possession.

Wrongful delivery.

Exceeding rights of use.

Injury or destruction.

Demand and refusal.

882. Sometimes a demand for the chattel by the party injured and a refusal by the wrongdoer to comply with the demand are necessary in order to maintain an action for a conversion. A demand and refusal may be material either as an essential element in the wrong or as evidence. (1) As an

[14] See § 750.

[15] See also § 794.

element in the wrong. If a person has a rightful but precarious possession of a chattel, his possession does not become wrongful, and so does not amount to a conversion, until a demand has been made upon him by the person entitled to the possession. This includes many cases falling under the exceptions relating to possession mentioned in §§ 750, 751. Generally when a person is permitted under one of those exceptions to take or keep possession of a thing in derogation of the true owner's rights his possession is merely precarious, and he must restore on demand. But a wrongful possession is itself a conversion, without any demand. The question whether the possession of a chattel is rightful or wrongful very often comes up in the form of a question whether an action will lie for a conversion without a previous demand. (2) As evidence of a conversion. If it is shown that the person on whom the demand was made was at the time of the demand or had been previously in possession of the chattel, and that the person making the demand had at the time of making it a right of present possession, then a demand and refusal is *prima facie* proof of a conversion by the former at that time; *i.e.* it is *prima facie* proof of any and all facts necessary to be proved to show a conversion at that time, for example that the party was still in possession and able to comply with the demand, that his possession was not rightful, or that he had been guilty of some act which would amount to a conversion even though his possession were rightful. It is not evidence of any one specific element in the wrong rather than another, but generally that the wrong of conversion has been in some manner or other committed; so that the burden of proving the contrary is thrown upon the party who has refused to deliver. Thus if a bailee does not restore the chattel to his bailor at the end of the bailment, that is not necessarily a conversion by him. It may have been lost or destroyed by some accident, in which case he is not liable at all, or by his mere negligence, in which case, although he is guilty of a wrong, the wrong is not a conversion. But if the bailor demands the chattel and the bailee does not restore it, then the latter is presumed to have converted it, and he must clear himself from this presumption by showing why he fails to restore. There-

As an element in the wrong.

As evidence.

fore it is often said that a demand and refusal is not itself a conversion but is evidence of a conversion.

Conversion of money.

883. At common law money was not capable of being converted, because a person who got possession of another's money was not bound to restore the specific coins but merely to repay a like amount. That is, money was dealt with *in genere* as a fund, and the duty to restore it was a debt.[16] But a box or bag of money, being an identifiable specific thing, could be converted. At present it is held in most places that money, funds and immaterial personal property generally, for instance shares of stock, can be converted by any means equivalent to the conversion of a chattel. But the name conversion is not applied to any wrong against real property.

Conversion of immaterial things.

Real property.

Deceit, *etc.*

884. Fraudulent misrepresentation, which when it amounts to an actionable tort is called deceit, and slander of title are usually injuries to the right of pecuniary condition; and breach of contract and of trust to rights *in personam*, as is also the conversion of funds.

Conspiracy.

Conspiracy, which is the combining together of several persons to do or procure the doing of a wrong, though often spoken of as a tort, is not really in itself a civil injury at all.[17] If any injury is actually committed pursuant to the conspiracy, that, and not the conspiracy, is the wrong; it would have been equally wrongful had there been no conspiracy. If no injury is actually committed, the conspiracy is harmless. Any persons may combine to do anything that they might do singly. The only effect of the conspiracy is to make all the conspirators, even those who do not in person take any part in the act, responsible as joint wrongdoers for any wrong that may be committed in pursuance of it.

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[16] See § 226.

[17] It may in some cases be a crime.

SUB-DIVISION IV. REMEDIES.

CHAPTER LIX.

REMEDIES IN GENERAL.

Remedial rights.

885. When a wrong has been committed a remedial or secondary right to the appropriate legal remedy usually arises in favor of the injured party. Sometimes a remedy is given against a merely threatened wrong, for the sake of preventing it. In the civil law a tort or delict is regarded as a kind of transaction between the parties, giving rise to an obligation *ex delicto*[1] to make compensation, and the action for the wrong as brought to enforce specifically the performance of that obligation. This theory of obligations *ex delicto* probably does not exist in the common law; if it does, no practical use is made of it. A right of action in the common law seems to be a mere permissive right to sue, not an obligation; though an obligation may ultimately be created by the judgment of the court in the action. That, however, is a primary obligation, whereas an obligation *ex delicto* is secondary.

Obligations *ex delicto*.

Rights of action at common law.

In the maritime law the theory of obligations *ex delicto* seems to prevail. A maritime lien arising from the commission of a wrong is probably to be considered as created for securing the performance of an obligation to make compensation. Probably obligations *ex delicto* are also recognized in equity.

In the maritime law.

In equity.

The expression "cause of action," which often occurs in the books, denotes generally the wrong itself out of whose commission the right of action arises, but sometimes it appears to be synonymous with right of action.

Cause of action.

A right of action is a chose in action, and at common law was subject to the rule that a chose in action could not be assigned. At present actions except for personal injuries, are freely assignable in most pences.

Assignment of actions.

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1. See § 254.

Extinction of rights of action.

886. A right of action and, when it is for the breach of an obligation, the obligation itself if it survives the breach,[2] can be extinguished in the following ways.

Judgment.

By the judgment or decree of a court. If the decision is against the party claiming the right, he is estopped by the record to assert it again. If it is in his favor, the original right is merged in the new obligation created by the judgment or decree.

Merger.

Release.

By a release or a covenant not to sue.[3]

Accord and satisfaction.

887. By accord and satisfaction. An accord means an agreement between the parties by which the party having the right of action consents to receive something from the other in satisfaction of his claim. Satisfaction means the actual receipt of the thing agreed upon, the performance of the accord. An accord by itself, without satisfaction, has no effect, and the injured party may sue notwithstanding the accord. A satisfaction may consist of a sum of money, any valuable thing or service or the acquisition of a new right. The payment of a debt after it is due operates, as to the right of action, as an accord and satisfaction. But the payment by the debtor of a part of the debt is not a good satisfaction and does not discharge the obligation or the right of action, even though the parties agree that it shall have that effect, because there is no consideration for the agreement;[4] though the payment of any sum may be accepted in satisfaction of an unliquidated claim. If however a creditor chooses to accept the principal only of his debt after it comes due, that is a good satisfaction, and he can not afterwards claim interest or costs, except that if he has already begun a suit for the debt he may go on and recover nominal damages and the costs of the suit already brought. At common law an accord and satisfaction, even the payment of the full amount due, did not discharge a right of action for a specialty debt; a release under seal was necessary. This rule so far as it relates to payment, seems to have had its origin in a confusion between the primary obligation, the debt itself, and the secondary right of action. First, the debt being ignored and

Payment of a debt.

Payment of principal only.

Specialty debts at common law.

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[2] See § 775. [3] See § 768. [4] See § 864, 865.

only the right of action kept in view, it was said that the payment was not a performance but a mere accord and satisfaction. Then the point of view was shifted, the right regarded as a specialty obligation, and the principle applied that a contract by specialty can not be varied or discharged by a parol agreement. Whereas the true view, as it seems to the present writer, would have been that the payment was a performance as to the original obligation and an accord and satisfaction as to the right of action, and thus discharged both. The courts of equity at an early period gave relief against this rule, and forbade the creditor to sue on his specialty if he had in fact been paid. At present the old rule is abolished at law, and payment of a specialty debt after it is due discharges it.

The rule in equity.

888. By limitation. The statutes of limitation[5] cut off rights of action after a certain time. A claim that is barred by the statute of limitations is said to be outlawed. The usual periods of limitation are for claims to land and specialty debts twenty years, on simple contracts and other non-specialty obligations six years, on rights of action for torts from two to six years; but they are different in different places. Exceptions are made, as has been explained elsewhere,[6] in favor of persons under disabilities, and also in cases where the person against whom the action should be brought is out of the jurisdiction and therefore can not be sued. Judgments are not barred by the statute of limitations. But after twenty years a judgment is *prima facie* presumed to have been satisfied.

Limitation.

Judgments.

The statute of limitations does not as such apply in equity. But the courts of equity, following, as it is said, the analogy of the statute, will often refuse relief on the ground of delay in seeking it. Express fiduciary trusts never outlaw, and will be enforced after any interval of time. Other purely equitable rights, implied, constructive and non-fiduciary trusts, including equitable liens, will usually be barred after the same lapse of time which would suffice in the case of similar legal rights. Where an equitable remedy is sought for the protection of a legal right, for instance an injunction against a nuisance,

Limitation in equity.

[5] See § 591. [6] See § 594.

the court will follow the statute, except in the case of fraud. The statute generally runs at law against a claim for compensation for fraud from the time when the fraud was actually committed, whether the injured party then knew of it or not, but in equity usually from the time when he discovers it or might have discovered it by the use of due diligence, because up to that time he is not to blame for omitting to sue. But even before the statutory period has elapsed the court will sometimes refuse an equitable remedy for a legal wrong and leave the injured party to his remedies at law, on the ground of *laches* on his part, *i.e.* unreasonable delay in bringing his suit.

Acknowledgment and new promise.

In the case of a debt an acknowledgment of the existence of the debt, from which the law will imply a promise to pay it,[7] or an actual promise to that effect, made before the period of limitation has expired, will, as the expression is, take the debt out of the statute, and a new period of limitation will begin from the time of the acknowledgment or promise. The acknowledgement may be in express words or by implication, for instance by part payment or payment of interest. After the statute has once run against a debt, a mere acknowledgement of it will not revive it, the debtor may admit his indebtedness and rely upon the statute as a defence; there must be an actual promise to pay, a voluntary relinquishment of the protection of the statute. The effect of the statute, though it quite extinguishes the right of action, is not to destroy the debt but merely to reduce it to the condition of an imperfect obligation; so that its existence is a sufficient consideration for a promise to pay it.[8] In most places at present by statute an acknowledgment otherwise than by part payment, or a promise, in order to take a debt out of the statute or to revive it, is required to be in writing and signed by the debtor. The principal English statute to this effect is known as Lord Tenterden's Act.[9]

Effect of limitation.

Form of the new promise.

Lord Tenterden's act.

Death of a party.

889. By the death of one party. At common law a right to maintain a personal action[10] became extinct on the death

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[7] See § 927.
[8] See § 364.
[9] 9 Geo. IV. c. 14.
[10] See § 902.

of either party. *Actio personalis moritur cum persona.* But now actions on obligations and for torts to property survive in favor of or against the personal representative of a deceased party. Actions for personal injuries survive in some places but not in others. Survival of actions.

890. In certain cases the law refuses a remedy for a wrong, these standing as exceptions to the general principle *ubi jus, ibi remedium.* Refusal of remedy.

If the right violated is one which belongs to the whole public or the wrong amounts to a public nuisance, no private person can sue for it unless he has sustained some damage special to himself distinct from that to the public; otherwise the wrongdoer might be vexed by numberless unnecessary suits. The remedy for the wrong is to be sought in a public prosecution in the name of the state. Thus if an obstruction is unlawfully placed in a highway, this is a public nuisance, and is also a violation of the right of every person in the community, since every one has a right in the condition of the highway.[11] Therefore every person in the community has suffered a technical wrong. But no one can sue for the wrong unless it has caused him some individual actual damage. There is some conflict in the decisions as to what is a sufficient special damage to an individual to justify a private action. Merely having to go around by another road to avoid an obstruction in the highway is not. But in some places any one may abate a public nuisance. Public wrongs. Special damage.

891. As a general rule a person against whom a wrong is committed is debarred from a remedy by the fact that he has contributed to the injury by his own wrongful conduct. But merely being in a place where one has no right to be will not generally have this effect. Thus if a person goes upon land as a trespasser and while there is injured by some wrongful act of the possessor of the land, *e.g.* by a spring-gun set there to shoot trespassers or by blasting operations negligently carried on, he may have an action for the injury, though it would not have happened had he not gone where he had no right to go.[12] But when a person is injured by another's negligence, he is refused a remedy if his own Contributory wrong. Contributory negligence.

11 See § 535.

12 But as to the condition of the land no duty is owed to a trespasser; see § 696. Nor are duties as to nuisances

negligence has contributed to the injury. Thus if A drives carelessly in the street and runs over B, he is guilty of a wrong. But if B has negligently put himself in the way of being run over, he can have no action for the wrong against A. So if a railroad train does not stop at a station where it ought to stop, and a passenger therefore attempts to get on or off the train while it is in rapid motion and is hurt in the attempt, he is without remedy. The comparative degree of negligence on either side is of no consequence. Even though A's carelessness in driving was gross and B's negligence in getting in the way was slight, still B is barred of his remedy. In some of the United States however a different rule prevails, and if the injured party's negligence is slight as compared with the other's, he is allowed to recover. In admiralty when an injury occurs by the concurrent negligence or wrong of both sides, the loss or damage is divided between them. This has been called a *rusticum judicium*. The common law rule as to contributory negligence does not apply to intentional wrongs, to wrongs caused by the breach of a peremptory duty, or to an injury from a nuisance, even though in the last case the duty broken may be merely one to use care. When such a wrong is committed, the contributory negligence of the injured party does not deprive him of his remedy.

Degree of negligence.

The rule in admiralty.

Wrongs not negligent.

Tort amounting to a felony.

892. At common law when an act was at the same time a tort and a felony, as if A stole B's goods, the injured party was not permitted to bring any civil action for the tort until he had first prosecuted the wrongdoer for the crime.[13] This was to make sure that criminals should be brought to justice. But that rule is now abolished in the United States, and is limited in England by so many exceptions and qualifications, that it is seldom actually applied.

Redress by the party's own act.

893. Sometimes a person is permitted to obtain redress by his own act for a wrong done him, without applying to a court. Most of these cases have been already mentioned under other heads. They include the retention of his debt by an executor, self defence, recaption of one's own property, abatement of

[13] See § 1243.

nuisances and seizure of heriots. But a few of them call for special notice here.

Re-entry.

When a person has been ousted from his estate in land, he may generally regain it by entry, or as it is often called re-entry.[14] But to this there are certain exceptions. In case of a discontinuance by a tenant in tail the rightful tenant can not have this summary remedy, but is put to his action to recover the land, because of the probability that the alienee of the tenant in tail did not know of the entail. Also if a disseizor or other wrongful tenant dies in possession and the land descends to his heir, which is called a descent cast, the right of entry of the rightful tenant is tolled or taken away, and he can only recover the land by an action. The reason is that the heir by the descent has acquired an apparent right of possession and perhaps is ignorant of the true state of the title, so that it is fitting that he should be deprived of the land only by the solemn judgment of a court. But by various statutes ancient and modern this effect of a descent cast has been abolished in certain cases.

Descent cast.

Distress.

Distraint or distress means the seizure of a person's property to compel him to do something which he ought to do. Distress for rent[15] and distress of cattle damage feasant[16] have already been spoken of. Other cases where this remedy was allowed at common law will be mentioned hereafter. As a general rule a distress must be reasonable in amount; but sometimes by the old law, if the party distrained upon continued obdurate, successive distresses might be made till all his property was taken. This was called distress infinite. It was permitted for a subtraction of services due by virtue of tenure[17] and in certain other cases, but is now abolished.

Distress infinite.

Remitter.

Remitter is where a person who has been ousted from his land afterwards gets possession of it under some defective title or in some way not sufficient to give him a good right, *e.g.* by purchase from the disseizor or his heir, in which case he is remitted or put back into his original right and may hold the land by virtue of that without regard to his new and defective

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14 See § 460, 461.

15 See § 524.

16 See § 742.

17 See § 878.

title. This is necessary, because, he not being able to enter upon or being an action against himself, he has no other way of establishing his true right.

Arbitration.

894. Arbitration is where parties between whom a dispute has arisen agree, instead of taking it into court, to submit it to the decision of one or more arbitrators. A very common course is for each party to appoint an arbitrator, and for the parties to empower the arbitrators in case they can not agree to call in a third person as umpire. A submission to arbitration may be made orally or in writing. The decision is called an award. At any time before the award is published either party has power to withdraw from the arbitration, to prevent which it is very common for the parties to give bonds to each other at the time of the submission that they will not withdraw but will stand to and perform the award. The giving of an arbitration bond does not take away the power of a party to withdraw, but his doing so will be a breach of the condition of the bond for which he will be liable in damages in a suit on the bond. The award when made amounts to a contract or agreement between the parties, and operates as a merger of the parties' claims and, if necessary, as a transfer of any property that can be transferred without a formal juristic act; but if the agreement or transfer comes within the statute of frauds, the award to have that effect must be in writing. If a formal juristic act of transfer, such as a deed or endorsement, is necessary, the award may direct such an act to be done. For example, if the arbitrators awarded that a chattel which had formerly belonged to A should thenceforth be the property of B, and they had authority to make such an award, that would be sufficient of itself to make B the owner; but if the property were land, the arbitrators could not by their mere award transfer the ownership, unless both the submission and the award were under seal, but they could order A to execute a proper deed.

Award.

Withdrawal from arbitration.

Effect of an award.

Making the ward a rule of court.

By statute it is now provided that in certain cases an award may be filed in court and made a rule of court, that is, be treated and enforced as if it were an order or decree of the court; and in some jurisdictions the submission itself may by the consent of the parties be made by an order of a court to

Submission by rule of court.

that effect, in which case a party can not withdraw from the arbitration without the consent of the court. If the arbitrators act corruptly or unfairly or one party obtains an award in his favor by fraud or coercion, a court of equity on the application of the party aggrieved will set the award aside and forbid its enforcement; but this will not be done merely on the ground that the arbitrators have made a wrong decision, because that would involves the trial of the whole case by the court, which it is the very purpose of an arbitration to avoid

Setting aside the award.

The law favors arbitration as a peaceful and inexpensive method of settling disputes after the dispute has arisen, when the parties are in a situation to understand the exact nature and scope of the question which is to be submitted. But it is very jealous of attempts to set up private tribunals in advance of any specific controversy and thus oust the courts of their jurisdiction. Therefore a stipulation in a contract that any dispute that may afterwards arise out of it shall be submitted to arbitration is usually held void as being against public policy; though a stipulation that the amount of damages payable on a breach shall be fixed in that manner is generally valid, since that leaves the question of the validity and effect of the contract to be passed upon by the regular courts. Similar principles apply to other sorts of private tribunals, such as those of churches in the United States, masonic lodges, clubs and societies. Their authority is confined strictly to matters relating to the government and dicipline of the associations which they represent, and the courts refuse to regard as binding any decisions of theirs upon matters of contract, property or personal rights. For instance, the officers of a club might have power, acting in a *quasi* judicial capacity under provisions of the constitution of the club, to order the expulsion of a member for misconduct; but if the constitution provided for any forfeiture of property or pecuniary penalty in such a case, that must be sued for in the public courts. And even in cases where private tribunals are allowed to exercise jurisdiction, courts of equity will forbid the enforcement of their decrees if it appears that their proceedings were corrupt or unfair, *e.g.* if a party was not given a fair hearing. By statute, however, in some places courts of arbitration, which

Arbitration favored.

Agreements to arbitrate.

Private tribunals.

Courts of arbitration.

are *quasi*-public tribunals, have been established in exchanges, chambers of commerce and similar commercial associations for the purpose of adjusting disputes among the numbers of the association concerning their rights or business as such.

Remedies in court. Damages. Specific remedies.

895. Remedies which are sought in court may be divided into compensatory and specific remedies. The former consist of pecuniary damages, which are awarded to the injured party as a compensation for the wrong done him. Specific remedies are either preventative, where the court interferes beforehand to prevent the commission of a wrong, as when an injunction is granted forbidding the creation of a nuisance, or executive,[18] where after a wrong has been committed the court puts the injured party into the actual enjoyment of the right of which he has been unjustly deprived, as where a disseizee recovers possession of his land by an action or a court of equity decrees the specific performance of a contract.

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[18] This expression is not in common use.

CHAPTER LX.

REMEDIES IN THE COMMON LAW COURTS.

Damages.

896. For every sort of legal wrong, that is, when the duty broken is a legal duty and the right violated a legal right, the injured party may have an action at law for pecuniary damages. The amount of damages to be awarded, or, as it is called, the measure of damages, is generally determined by the jury, though in some cases there are rules fixing, either absolutely or within certain limits, the amount recoverable. For this reason damages are said to be unliquidated until they have been liquidated or ascertained by the verdict of the jury.

The measure of damages.

Interest as damages.

Damages for the unjust detention of a debt consist of simple interest on the principal of the debt from the time when it came due, or in the case of a debt payable on demand from the time when the creditor actually demanded payment For although a suit may be brought for money payable on demand without making any demand, this kind of interest only runs from the time of an actual demand. Interest given as damages, which accrues only after the maturity of the debt, which does not depend upon contract and which is given whether or not the debt originally bore interest, must be distinguished from interest accruing before maturity which is due only by contract.[1] But interest by way of damages is not allowed upon arrears of unpaid interest; that is, compound interest is not given.

Nominal damages.

Besides interest, the creditor is entitled to nominal damages for the detention.

Damages for conversion.

For the conversion of a chattel the general rule is that the measure of damages is the value of the chattel at the time of the conversion with interest. The injured party can not recover for any additional damage that he may have suffered from being deprived of it, for example the loss of a chance to sell it for a high price. To this general rule there are however a few

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[1] See § 767.

exceptions. If the chattel has been restored before the verdict, its value at the time of restoration is deducted or, as the expression is, goes in mitigation of damages.

Damages for personal injuries.

For personal injuries it is impossible to lay down any rule of compensation, and the damages have to be left to the discretion of the jury, subject to the power of the court to set the verdict aside and order a new trial if they are grossly excessive or inadequate.[2]

Nominal damages.

Every violation of a right imports pecuniary damage.[3] But if no damage has actually been caused, the injured party will recover only what are called nominal damages, which in this case means some trifling sum, such as one cent.

Violations of rights not corresponding to the duty.

897. Although to make a wrong the right violated must be the very one that corresponds to the duty which has been broken, yet when such a violation has happened and the wrong is once thereby complete, resulting violations of other rights may be taken into account in estimating the *quantum* of damages, provided they are proximate to the breach of duty. Thus if a personal injury, such as a battery, causes pecuniary loss, that may be recovered for in an action for the wrong, although the duty broken in the commission of a battery does not correspond to the right of pecuniary condition.

Direct damage.

Direct damage is that which is the direct consequence of the wrongful act or omission, such as bodily injuries from a battery or injuries to land from an unlawful entry. All other

Consequential damage.

damage is indirect or consequential. If the injured party seeks to recover for consequential damage, he must allege the occurrence of it in his pleadings. This allegation is often introduced by the words "whereby" or "by reason of which" following the description of the wrong itself; for instance, that the defendant assaulted and beat the plaintiff, "whereby" the plaintiff was disabled from attending to his business and suffered pecuniary loss. In the old Latin pleadings the corresponding words were *per quod*, for which reason consequential damages are often said to be recoverable "under a *per quod*."

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[2] See § 1060. [3] See § 686.

Compensatory damages.

898. Regularly the object of damages is only to compensate the injured party for the wrong done him, not to punish the wrongdoer. As has been explained,[4] there exists an accessory right of mental security which is violated in certain cases of wilful wrongs, and for the violation of which additional damages may be given by way of compensation.

Punitive damages.

In many places also in cases of malicious wrongs, or even of gross wrongs done with an actual wrongful intent though without malice in the proper sense, what are called vindictive, punitive or exemplary damages may be awarded in excess of the actual damage, for the punishment of the offender. Much confusion exists between vindictive damages in the proper sense and damages which are in theory compensatory for the violation of the accessory right of mental security, and generally it is not important to distinguish between the two.

Specific remedies.

899. Besides the general compensatory remedy of damages, specific remedies of various sorts are given in the courts of common law, as will be presently explained.

Proceedings in court.

900. The proceedings by which remedies are or have been obtained in courts are divided into (1) actions or suits, (2) assizes, and (3) special proceedings.

Actions.

An action is the ordinary way of seeking a remedy for a wrong. The party bringing the action is called the plaintiff and the party against whom it is brought the defendant.

Assizes.

Assizes were proceedings which closely resembled actions, and for most purposes were classed with actions, but differed from them in certain details of procedure. They long ago became obsolete, but still need to be understood because of their bearing upon the later law.

Special proceedings.

Special proceedings are summary methods of obtaining remedies which are used in certain cases, mostly where for special reasons a speedier remedy is required than can be had by the slow course of a regular action. The procedure in these differs greatly from that in actions. There is in general no trial by jury, and no formal judgment is delivered. Instead of a judgment the court makes an order, which, although it disposes of

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[4] See § 422.

the immediate controversy as effectually as a judgment would, generally is not, like a judgment, decisive of the parties' rights, and does not create an estoppel, so that the parties are not prevented by it from litigating the same question again. The general principle is that a person's rights shall not be finally adjudicated upon except after a regular trial. In most of these proceedings special writs are used, and the proceeding generally takes its name from that of the writ. The party instituting the proceeding is usually called the petitioner, complainant or relator,[5] and the other party the respondant, but sometimes the names plaintiff and defendant are employed.

The remedies obtainable by action or assize will first be considered and then those which must be sought by special writs.

Forms of action.

901. At common law various forms or species of actions were established for the redress of different kinds of wrongs. A plaintiff had to select the proper form of action, and if he brought his suit in the wrong form he would fail, even though in fact he had a good cause of action. If a wrong was committed for which no appropriate form of action could be found, the injured party was remediless. It was largely the inadequacy of these forms of action to furnish remedies in many cases which gave rise to the equitable jurisdiction of the Chancellor, and in some cases led to the interference of the ecclesiastical courts in secular matters. The common law forms of action are now in most places abolished, but an understanding of them is still necessary.

Real, personal and mixed actions.

902. Actions were divided into real, personal and mixed.[6] A real action was one which was brought to specifically enforce a real property right, that is, to secure or replace the plaintiff in the actual enjoyment of the right; in the case of corporeal hereditaments it was an action to recover the seizin or possession of the land. The plaintiff in a real action was called the demandant, and the defendant, in an action for land, the tenant. A mixed action lay to recover the possession of land together with damages for the defendant's wrong in having unlawfully excluded the plaintiff from the possession. But by various old

[5] See § 929.

[6] These names were borrowed from the civil law, where, however, they have a somewhat different meaning. See § 443.

statutes damages were allowed to be recovered in certain real actions, which nevertheless continued to be classed as real rather than as mixed actions. Personal actions were for the recovery of the possession of chattels personal, for the specific enforcement of obligations, or for damages for wrongs.

Real actions.

903. Real actions were very numerous, but as they long ago became extinct only a few of the most important will be mentioned here. They usually, like special proceedings, took their names from those of the writs by which they were begun. They were divided into possessory and petitory actions, which latter were begun by writs called writs of right.

Possessory actions.

A possessory action was one in which the plaintiff or demandant sought to recover the possession or *quasi*-possession of real property from the defendant or tenant on the mere ground that he had a better right than the latter to the present possession of it. But since one of two persons might have a better right of possession in a thing than the other without either being the owner or tenant in fee, a possessory action did not necessarily involve any question of proprietorship. And even if that question happened to arise in the action, as if for instance the defendant attempted to maintain his right of possession by proof that he was in fact the lawful tenant in fee, the judgment in the possessory action was not regarded as decisive of the question, but the defeated party could afterwards resort to a writ of right to recover the property *jure proprietatis*. Assizes were classed with possessory actions.

Petitory actions.

In petitory actions or writs of right the demandant asserted himself to be the lawful tenant of the property, and demanded possession on the ground of his right. The judgment was conclusive between the parties and their privies as to the right. Of course if the lawful tenant recovered possession in a possessory action, he was practically in as good a situation as if he had recovered under a writ of right, because the unlawful possessor against whom he had recovered the land had no means of getting him out. If the latter brought a real action, he would fail in it Therefore, the proceedings in possessory actions being simple, speedier and less expensive, these were generally preferred. But in certain cases the true owner had no possessory

When a petitory action was necessary.

remedy and was driven to his writ of right as his only resource. This happened chiefly in three cases: (1) after a discontinuance by a tenant in tail, in which case the party next entitled was not allowed a possessory action, the tenant in tail having conveyed the right of possession to his alienee: (2) when the true tenant had had judgment given against him in a possessory action; (3) when the possessory remedy was barred by the statute of limitations, the period of limitation being shorter for possessory actions than for writs of right.

Actions for *mesne* profits.

When a plaintiff had recovered his estate in a real action and was then entitled to treat the party who had ousted him as having never been a tenant but a mere trespasser, he could have a personal action against him to recover the rents and profits of the land during the wrongful occupation. These were called *mesne* or intermediate profits, and the action, being generally in the form known as trespass,[7] was called an action of trespass for *mesne* profits.

Writ of entry.

904. The most usual common law possessory action was a writ of entry or *praecipe*[8] *quod reddat*. This was begun by a writ directed to the sheriff, ordering him to command the tenant either to surrender the land to the demandant or appear in court on a certain day and show cause why he did not do so. The demandant in this action asserted that the land was his, and that the tenant had obtained possession of it only by means of a disseizin, intrusion or some sort of ouster committed against the demandant or his predecessor in right either by the tenant himself or by some one to whom the tenant had succeeded.

If the ouster was proved, the demandant recovered the possession, unless the tenant could show a better right in himself. That is, the fact that the tenant's possession originated in an act of ouster was deemed sufficient *prima facie* proof that it was a wrongful possession. The special forms of this action were very numerous. Some one of them was applicable in any case of ouster except a discontinuance by a tenant in tail and some kinds of deforcements. This was the form of action that was used for a common recovery.

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[7] See § 919.

[8] See § 1034.

Dower *unde nihil habet.*

905. Among those deforcements was deforcement of dower, which occurred when a tenant in fee died leaving a widow who was entitled to dower, and the heir refused to assign her any dower, that is, to designate and set out to her the particular portion of the land which she was to have, during the time appointed by law.[9] For this she had a possessory action by a writ of dower *unde nihil habet*, under which the court would assign her dower. If too much dower were assigned her, the heir could have this corrected by a writ of admeasurement of dower.

Admeasurement of dower

Possessor assizes.

906. The writ of entry being a very ancient remedy, the proceedings under it were somewhat tedious, for which reason more speedy remedies were invented, it is said by Glanvill, chief justiciar under Henry II, in the form of the possessory assizes. As a writ of entry was an action which disproved the title of the tenant by showing its unlawful commencement, so these assizes were proceedings which proved the title of the demandant by showing his or his ancestor's possession; that is, the demandant took the position of a person who was presumed to be the owner by virtue of a prior possession,[10] on the strength of which he recovered unless the tenant could show a better right. These remedies were applicable to two kinds of ouster only, an abatement and a recent or novel disseizin.

Mort d'ancester

If the abatement took place on the death of the demandant's father or mother, brother or sister, uncle or aunt, nephew or niece, the remedy was by a writ of *mort d'ancestor;* if on the death of any other relative, by writs of the same nature but having different names. They were all known as ancestral writs. The inquiry under the writ was directed to the point whether the demandant's ancestor was seized at the time of his death and whether the demandant was his heir, these facts if established being deemed sufficient to show a *prima facie* right of possession in the demandant. But if the lands were devisable, these writs would not lie, because the ancestor might have given the land to the defendant by his will; and therefore when after the statute of wills all lands were devisable they ceased to be used.

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[9] See § 977.

[10] See § 977.

Novel disseizin.

An assize of novel disseizin went upon the ground of a former seizin, not in the demandant's ancestor but in himself, and a disseizin of him by the tenant within some short period before the action which was specified in the writ.[11] The establishment of these facts made out a *prima facie* case for the demandant. Under the writ the sheriff seized the land and the chattels on it, and kept them in his custody till the determination of the case. If the demandant was successful, he recovered the land and damages, this being the only case in which damages were recoverable in a real action at common law.

Disseizin by election.

The assize of novel disseizin was available only in case of a disseizin, not in other kinds of ouster. But because of the celerity and cheapness of this remedy it became very popular, so that in time the courts permitted a party who had been ousted but not technically disseized to admit or confess himself disseized for the purpose of using the assize. This was also allowed in cases of subtraction of rents or services and disturbances of incorporeal hereditaments which were equivalent to disseizin.[12] It was called disseizin by election.

The mere writ of right.

907. Among petitory actions or writs of right the most important was the mere writ of right, which lay only in favor of a tenant in fee simple to recover his fee, in which the issue, which was called the mise, was joined on the question which of the parties was the rightful tenant in fee simple, and a judgment on this point forever settled that question between them and their privies. The action ought to be brought in the court baron of the lord of whom the land was holden, and when so brought was commenced by an original royal writ, called a writ of right patent or open, directed to the lord, commanding him to "hold full right to" the plaintiff of the fee in question, *i.e.* to entertain the suit. If the lord refused or delayed justice, or in later times on a mere *pro forma* suggestion by either party that he had done so, the suit might be removed into the county court by a writ of tolt, and from thence into the King's court by a writ of *pone* or *recordare facias*. If the lord had no court or waived his right of

[11] In a writ of Henry II the time specified is "since my last journey to Normandy."

[12] See § 875.

jurisdiction (*remisit curiam suam*), the action might be brought at first in the King's court by a writ called a writ of right close. This was always the proper way when the land was held of the King directly. The demandant had to allege seizin in himself or in some one under whom he claimed, and in the latter case to derive his right from that person, that is, specify all the descents or transactions by which the right had become vested in himself. To this the tenant answered by denying the demandant's right and alleging that he had a better right than the demandant had. This put the demandant upon proof of his title, for it was a rule in this action that the demandant must recover upon the strength of his own title, not upon the weakness of the tenant's; that is, it was not enough for the demandant to prove that the tenant had no right, or even that he himself had a better right, but he must prove affirmatively and fully his own title as lawful tenant in fee simple.

Demandant must prove his title.

908. If a tenant in tail alienated the estate, and so effected a discontinuance as against the heir in tail or a remainderman or reversioner, the latter might have a writ of right called a *formedon* (*secundum formam doni*) to recover his estate. This writ was given by the statute *de donis* which first created estates tail.

Formedon.

If a tenant in fee tail or for life had lost his estate by a recovery against him in a possessory action, that recovery at common law was final, there being no petitory action provided for such tenants. But in case the recovery had happened because of the tenant's non-appearance, in which case it might have been through mistake or accident, the statute of Westminster 2nd gave him a writ of *quod ei deforceat*, which was in the nature of a writ of right. But if the recovery was after defence made, the writ would not lie; which was the reason why in after times a common recovery for the cutting off of an entail was suffered by means of a writ of entry, on which after voucher the vouchee made defence.[18]

Quod ei deforciat.

Common recoveries.

A writ of right of dower was the remedy of a widow when insufficient dower had been assigned her or none at all, in

Writ of right of dower.

[18] See § 598.

which latter case she might have also a writ of dower *unde nihil habet.*

Partition. Coparcenors could obtain partition of the land among them by means of a writ of partition.

Remedies of a lessee. **909.** Originally, as has been said, a lessee was not regarded as having any estate in the land, but merely a contract with his lessor; and his remedy, if the lessor dispossessed him or permitted him to be dispossessed, was by an action against the lessor on the contract. When in course of time he came to be recognized as having possession and not merely detention of the land, he was allowed to maintain a personal action for damages against a person who ejected him. This was called an action of trespass in ejectment, or more often simply of ejectment, and was begun by a writ of *ejectione firmae.* Afterwards the courts of equity began to oblige the ejector to make a specific restitution of the land to the lessee, treating the former as a kind of constructive trustee for the latter; and when that practice had become well established the courts of law fell in with it, and in an action of ejectment would give the lessee possession of the land as well as damages, so that the action became a mixed action instead of a purely personal one. This method seems to have been settled as early as the reign of Edward IV. But the action, having been originally personal, retained the comparatively simple and inexpensive procedure of personal actions, and therefore was really a better remedy than a real action; for which reason freehold tenants desired to use it. To enable them to do so a number of remarkable contrivances and fictions were resorted to and permitted by the courts, the result of which was that ejectment became the common method of vindicating all property rights that included the right of present possession in land, and the older real actions and assizes went out of use.

Trespass in ejectment.

Extension of the action to freeholders.

The old form of ejectment. In the first place the claimant made a formal entry upon the land, and so acquired at least a temporary, though perhaps defeasible, seizin or possession thereof, which enabled him to make a lease of it for years to a person who was to act as the nominal plaintiff in the suit. The entry was necessary, because a lease by a person who had neither seizin nor possession would be void, and its making would moreover amount to the crime

of maintenance; and indeed it was doubted for some time whether such a mere formal entry and lease was not within the rule against maintenance. The lessee remained on the land till somebody ejected him. The ejector might be the person in occupation of the land, against whom the action was really to be brought; but generally it was a person employed for the purpose, who was called the casual ejector. The lessee then brought his action of ejectment against the party who had ejected him. If that were a casual ejector, he, thus becoming the nominal defendant, was required to give notice to the occupant of the land, the true defendant, of the commencement of the action, and invite him to appear and take upon himself the defence. For although a judgment against the casual ejector would not be legally binding upon the tenant, yet under such a judgment the court, not being supposed to know of the existence of the latter but assuming the party who appeared as defendant in the action to be the actual tenant, would put the nominal plaintiff into possession, who would at once surrender it to his lessor, the true plaintiff; and then the tenant would be driven to assert his rights in another action, in which he would fail unless he could show a better right than that of the plaintiff in possession under the judgment. Therefore it was advisable for the tenant, on being notified of the suit, to appear and have himself substituted in it as defendant by an order of the court, and defend his possession in the action of ejectment.

The modern form of ejectment.

910. The nominal plaintiff in order to succeed in his action had to prove four points, viz., (1) a good title or right to the land in his lessor, the true plaintiff, (2) the lease to himself, (3) his entry upon the land pursuant to the lease, and (4) his ejectment or ouster from it. But in the time of the protectorate, chief justice Rolle invented a new and more convenient way of bringing the action. No lease, entry and ouster were actually made but were merely alleged to have been made, the supposed lessee and nominal plaintiff being a fictitious person, who was usually named John Doe, and the casual ejector being also a fictitious person. The notice to the tenant was given by the lessor of the plaintiff, *i.e.* the true plaintiff, in the

name of the supposed casual ejector; and when the tenant appeared and applied to be admitted as a defendant he was required by the court, as a condition of the granting of his request, to enter into a stipulation or rule of court, called the consent rule, by which he agreed to admit the facts of lease, entry and ouster and confine his defence entirely to the question of the right to the land, which remained as the only question to be tried in the action. The plaintiff's lessor became a party to the consent rule, and agreed to be responsible for any costs that might be awarded against the nominal plaintiff. The action of ejectment having been thus turned into a proceeding for trying title to land, the damages given were usually merely nominal, the plaintiff after recovering the land, if he had any claim for substantial damages, resorting to his action of trespass for *mesne* profits; so that ejectment came to be in effect a real action. In some of the United States it was further simplified by allowing it to be brought in the first place in the name of the true plaintiff against the true defendant.

The consent rule.

Damages.

Ejectment in the United States.

911. For a nuisance there was formerly a remedy by an assize of nuisance, at first against the actual maker of the nuisance only, but extended by the statute of Westminster 2nd to his alienee who wrongfully maintained it. Under this writ the plaintiff had judgment for the abatement of the nuisance and for damages.

Assize of nuisance.

There was also a writ of *quod permittat prosternere*, which was of the nature of a writ of right, under which the defendant was commanded to permit the demandant to abate the nuisance or show cause why he should not.

Writ of *quod permittat*.

Both of these remedies are now abolished, a personal action having been found a more convenient mode of getting damages, and an injunction in equity of preventing the making or continuance of a nuisance.

Modern remedies.

912. A writ of waste was an action which, partly by the common law and partly by the statutes of Glocester and Westminster 2nd, might be brought by the immediate reversioner or remainderman in fee against a tenant for life or years who unlawfully committed waste in the land, or for a like cause by one joint tenant or tenant in common against another. But

Writ of waste.

it did not lie between coparcenors, because they might have a remedy by partition. It was a mixed action; the demandant recovered the land itself, as a penalty for the commission of the waste, and also treble damages. This remedy for waste has been superseded in modern times by an action for damages; the forfeiture of the land is no longer a consequence of waste.

Modern remedies.

913. There were also certain ancient writs in the nature of writs of right, by which remedies might be had for subtractions. The writ *de consuetudinibus et servitiis* lay for the lord against a tenant who refused to render rents or services due by tenure or custom, under which the court ordered the tenant to specifically perform his dues. On a writ of *cessavit* the land itself could in certain cases be recovered from a tenant who had wholly failed to perform his services for two years; or if the tenant in an assize or action of replevin disclaimed his tenure and denied his lord's right, the lord could take back the land by a writ of right *sur disclaimer*.

Remedies for subtraction.

Writ *de consuetudinibus*.

Cessavit.

Writ of right *sur disclaimer*.

On the other hand if the lord distrained for more than he had a right to, the law gave the tenant a writ of *ne injuste vexes*, to prohibit the lord's proceedings. Or if a *mesne* lord permitted his tenant to be distrained upon by the lord paramount for rents or services due the latter from the *mesne* lord, the tenant could get reimbursement from his immediate lord by a writ of *mesne* (*de medio*); and if the lord failed to make such compensation he was forejudged of his mesnalty and the tenant should hold directly of the superior lord.

Ne injuste vexes.

W. it of *mesne*.

Services due by custom or prescription *e.g.* a custom that all inhabitants of a village should do suit to a particular mill or oven that is, bring their grain there to be ground or their bread to be baked, were enforced by various writs *de secta ad molendinum, ad furnum, etc.*

Writs *de secta*.

All the special writs for subtraction above mentioned were of the nature of real actions, and in later times their places were taken by the more convenient remedy of an action for damages.

Modern remedies.

914. For disturbances the usual remedy is now by an action for damages or an injunction in equity. But there were formerly certain special remedies.

Remedies for disturbance.

Surcharge of common.

In case of a surcharge of a common by any commoner, either the lord or any other commoner could have a writ of surcharge of common, directed to the sheriff and ordering him to summon a jury and with their assistance to admeasure the whole common, that is, to ascertain how many cattle each commoner had a right to put in. If after that the same defendant surcharged the common again, the plaintiff could have a writ of second surcharge, under which he recovered damages and the supernumerary cattle were forfeited to the King.

Second surcharge.

Quod permittat.

If the lord obstructed the common, as by enclosing it or plowing it up, any commoner could treat this as a disseizin and have an assize of novel disseizin. Or in case of such an interference by the lord or by any one else as amounted to a total deprivation of the common, the commoner had a right to a real action by a writ of *quod permittat* to recover his right of common.

Writ of right of advowson.

For a usurpation of an advowson the only remedy by the common law was a writ of right of advowson, which was a petitory action. But by the statute of Westminster 2nd., the patron might treat it for six months as a mere disturbance and resort to a possessory remedy; and by a statute of Anne a usurpation did not affect the right to future presentations.

Assize of *darrein presentment.*

Quare impedit.

For mere disturbance of an advowson there were two possessory remedies. An assize of *darrein presentment* was based upon the fact that the demandant or his ancestor had made the last presentation, and therefore he was presumptively the rightful patron. But the most usual remedy was a writ of *quare impedit,* which was a possessory action brought by the true patron against the bishop alone or against him, the pretended patron and the latter's clerk, according to the circumstances of the case. The demandant must show his right to the advowson and at least one actual presentation by himself or his predecessor in title, on doing which he got judgment to recover the advowson and in most cases to remove the wrongful incumbent.

Personal actions; *ex contractu* and *ex delicto.*

915. Coming now to personal actions: these are divided into actions *ex contractu,* which were brought to specifically

enforce obligations, whether arising from contract or not,[14] or for damages for breaches of obligations, and actions *ex delicto*, which were to recover the possession of chattels or damages for torts, and were therefore always based upon a tort or delict.

Debt.

916. Of the former class the most important was the action of debt, which lay for the recovery of any sort of a debt, whether created by specialty or otherwise. The sum recovered consisted principally of the debt itself, so that to that extent the action was not for damages but for the specific enforcement of the obligation.[15] But the creditor was also entitled to damages for the unjust detention of his debt.[16] So that the action of debt had a double aspect, being partly for the specific enforcement of the obligation and partly for damages for its breach. Generally at present the entire sum recovered, including the debt itself, is called damages; but that is not technically correct. Since a judgment created a debt, a new action of debt might be brought on the judgment, a new judgment recovered, and then another action brought on that, and so on without end until the debtor paid. Actions of debt on judgment have been abolished in some places in modern times as being merely vexatious.

Debt on judgment.

Debt in the *debet* and in the *detinet*.

The form of the action was either in the *debet* and *detinet* or in the *detinet* only; that is, the writ sometimes stated that defendant owed and unjustly detained the money and sometimes merely that he unjustly detained it. The action was brought in the first form by the original creditor against the original debtor or his heir; but an executor or administrator sued in the *detinet* only, because the debt was not strictly his own debt, though he was entitled to receive the money The action of debt on a simple contract was open to one serious objection. The defendant could wholly defeat the plaintiff's claim in

Wager of law.

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[14] They were called *ex contractu* because of the ancient notion that every legal obligation arose from an express or implied contract; see § 375, 377.

[15] Since a debt may be considered as a fund belonging to the creditor in the possession of the debtor (see § 766,) the action was analogous to an action for possession, and has been likened by some writers to a real action.

[16] See § 896.

most cases by simply coming into court and making oath that he owed the plaintiff nothing, which the plaintiff was not permitted to contradict. This was called wager of law, and will be more fully explained in another place.[17]

Covenant.

917. Covenant was an action to recover unliquidated damages for the breach of a covenant or promise under seal. In ancient times however, in the case of a covenant real, *i.e.* a covenant to convey real property, the court could enforce the contract specifically by ordering the defendant to make a conveyance.[18]

Covenants [real.

No action on simple contracts generally.

There was no form of action for the breach of a simple contract which did not create a debt, which included all bilateral[19] simple contracts. Such contracts were not binding or enforceable at common law. The ecclesiastical courts, however, would sometimes enforce them, in the exercise of the jurisdiction assumed by those courts over moral delinquences, on the ground that for a person to break his contract was sinful.

Account.

918. The action of account lay to settle accounts between two persons, one of whom stood in the relation of agent or servant to the other. It might be used on the dissolution of a partnership consisting of only two partners to settle the partnership accounts. The first question to be decided was whether the defendant was bound to account to the plaintiff at all. If that was decided in the affirmative, a judgment was given that the defendant do account, and then the case was referred to auditors appointed by the court to take the account, that is, to go over the accounts of the parties and report to the court the balance due, whereupon a final judgment was rendered for that amount. This action was generally disused because it was found that accounts could be more conveniently settled in the courts of equity.

Actions *ex delicto*.

Trespass.

919. Among actions *ex delicto*, an action of trespass lay to recover unliquidated damages for a trespass. It seems also to have been occasionally used in ancient times when the wrong did not amount to a technical trespass.

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[17] See § 1052.

[18] This was the form of action used in levying a fine. See § 597.

[19] See § 379.

It was necessary to allege in the pleadings that the wrong was committed *vi et armis*, in order to give the royal courts jurisdiction,[20] for which reason the ordinary action of trespass was often called trespass *vi et armis*. An action of trespass for an unlawful entry upon land, *i.e.* for breaking the plaintiff's close,[21] was distinguished as trespass *quare clausum fregit*;[22] and one for the tortious taking of chattels as trespass *de bonis asportatis* or simply *de bonis*. But these were not regarded as separate forms of action.

Vi et armis.

Quare clausum fregit.

De bonis.

920. If goods were unlawfully distrained, the remedy was by an action of replevin, in which, the plaintiff having given security that he would duly prosecute his action and would restore the goods if it was decided that he had no right to their possession, a writ of *replegiari facias* was issued, under which the sheriff seized the goods and delivered them to the plaintiff. If the goods had been eloigned (*elongata*), that is, concealed or carried away so that the sheriff could not find them, the plaintiff might have a writ of *capias in withernam* to take other goods of the defendant in lieu of the first. Goods taken *in withernam* could not be replevied until the original goods were forthcoming. The plaintiff having got possession of the goods in this summary manner at the commencement of the suit, the issue to be tried was which party had the right of possession, which usually turned upon the question whether the distraint was lawful. The court awarded the possession to the party who was found to be entitled to it.

Replevin.

Capias in withernam.

In modern times the remedy by replevin has been much extended, and in most places goods can now be replevied by the person entitled to their possession whenever they are in any manner unlawfully detained from him, and not merely in case of an unlawful distraint.

Modern extension of the action.

There was formerly an action to replevy a human being unlawfully imprisoned, by a writ *de homine replegiando*. Any one could bring the action on behalf of the prisoner, and surety must be given that he should be forthcoming to answer any

Writ *de homine replegiando.*

20 See § 179.

21 See § 225.

22 Usually written *qu. cl. fr.*

charges against him, on which being given he was set free. But this action is long since fallen into disuse, a writ of *habeas corpus* being found a more effectual remedy in cases of false imprisonment.

Detinue.

921. Detinue lay for a chattel which was unlawfully detained, in violation of the duties in § 800, from the person having the right of immediate possession, whether the original acquisition of possession by the defendant was rightful or wrongful. The judgment was in the alternative, that the defendant restore the chattel to the plaintiff or pay its value. Detinue seems to have been connected, or perhaps originally identical, with debt in the *detinet*, but applied to goods instead of money. The defendant had the same right as in debt to wage his law. Therefore, and because the chief use of the action was in cases of bailment where there was a contract between the parties, the action has been classed by some among actions *ex contractu;* but the weight of authority holds it to be *ex delicto.*

Wager of law.

Other common law actions.

922. Besides the above mentioned common law actions, which continued to be employed until the introduction of the modern procedure, and indeed are still in use in some of the United States, there were a few others which went out of use at an early period, being superseded by the action on the case next to be mentioned.

Inadequacy of common law actions.

923. After the writs by which actions were begun in the common law courts had become "of course," each form of action had its particular form of writ, and the clerks in Chancery would not issue writs in any but the established forms.[23] The King might still grant extraordinary writs, but early ceased to do so for the purpose of bringing suits in the ordinary courts. There were accordingly a good many cases in which no appropriate writ or form of action existed, and therefore no remedy could be had; for instance for torts committed by negligence or fraud which did not amount to trespasses, or for the breach of simple contracts which did not create debts. The inadequacy of the common law scheme of remedies was severely felt, and an attempt to obviate it was made in the statute of West-

[23] The Chancellor was forbidden to do so by the provisions of Oxford in 1258.

minster 2nd. That statute provided that whenever in any case a form of writ was found in the Chancery, and in a case falling under the same right and requiring a like remedy no writ could be produced, the clerks in Chancery should make a new writ or refer the matter to Parliament to have one made.

The statute of Westminster 2nd.

If that statute had been liberally construed and the powers given by it freely exercised, perhaps the courts of common law might have been enabled to give relief in all or nearly all the cases in which, for want of any remedy at law, parties were forced into the court of Chancery, and equity as a separate system of law might never have existed. But for some reason which is not now fully understood, the clerks in Chancery refused to make any new writs except writs of trespass, in which, however, the form of the older writs in trespass was not exactly followed but was varied to suit the circumstances of the case. Thus was introduced a single new form of action known as trespass on the case, an action on the case, or simply as "case," which, like the older action of trespass, was an action to recover unliquidated damages for a tort. This was used for many kinds of torts which more or less resembled trespasses but yet were not technically such, for instance where the wrongdoer had possession of the thing injured at the time of the wrong so that trespass would not lie, or where the injury was not forcible, or the damage was indirect, or the right violated was one on whose violation an action of trespass could not be based. It was used for negligent or malicious injuries, slander and libel, fraud, malicious prosecution, injuries from nuisances and in many other cases. In fact it became the general remedy for torts which were committed by wrongful acts but did not amount to trespasses, and from its greater convenience it gradually superseded in such cases the old common law writs and actions. But it being still in theory in the nature of an action of trespass, it was a long time before the courts saw their way to applying it to mere wrongful omissions. It was extended to omissions by a series of steps,[24] at each of which new duties were introduced into the law, so that what was in theory and perhaps in intention

The action on the case.

Wrongful omissions.

[24] Holmes, Common Law, Lect. V, VII.

a mere rule of procedure became the origin of very important changes in the substantive law. First it was allowed where the
Misfeasance. combination of an act and an omission could be construed to amount to doing the act in an improper way,[25] and then in cases of other negligent omissions to take precautions against the consequences of one's acts, in both of which cases the damage was directly or indirectly traceable to the party's act.

The custom of the realm. **924.** The further development of the action proceeded on three lines. First, a person who engaged in one of the more common callings or trades, such as that of a smith or a miller, was considered to be under a duty to render his services when requested and to have competent skill; "for it is the duty of every artificer to exercise his art rightly and truly as he ought."[26] For a refusal to act or for negligent or unskilful work an action on the case would lie against him, founded on the fact of his being a "common" smith or other mechanic. The duty in those cases was said to be imposed by the custom of the realm. This principle as one of general application has become obsolete. A person following a mechanical trade is not now bound to serve a customer unless he chooses, and the rules as to his duty to use care and skill are the same and rest upon the same grounds as those of other persons who undertake to render services. But some fragments of it still remain in the peculiar non-contractual duties of common carriers and innkeepers.[27]

Trover. **925.** Secondly, when a person had found a lost chattel and converted it to his own use, an action on the case was given against him for its value. This species of action on the case came to be considered a separate form of action, and received the name of trover.[28] This covered a part of the ground of the action of detinue; and since in trover there was no wager of law, it was preferred to detinue. Therefore the courts by a daring fiction or stretch of authority extended the scope of the action. In trover the plaintiff originally had to allege and prove that the chattel was his, that he lost it and that the defendant found it and converted it to his own use. The courts

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[25] See § 695.
[26] Fitzherbert, Nat. Brev. 94, D.
[27] See § 816, 824.
[28] From French *trouver*.

treated the allegations of loss and finding as purely formal and immaterial, refused to listen to any denial of them, and confined the trial to the questions of the plaintiff's right and the conversion by the defendant. Thus the action of trover became available in any case of the conversion of a chattel, and then the notion of conversion was extended as much as possible so as to admit of the use of this action.[29] The action of detinue became nearly extinct, and even after wager of law was abolished, it was only rarely used.

Action on the case on an *assumpsit*.

926. Thirdly, when a person had undertaken (*super se assumpsit*) to perform services for another and had actually entered upon the performance, and then was guilty of negligence in the performance or improperly desisted from it, his entire course of conduct, though all that was actually wrongful in it might consist in omission, was considered as a wrongful act for which an action on the case would lie. The action was said to be founded on an *assumpsit*. In this way the duty of an undertaker, mentioned in § 813, was introduced into the law about the time of Edward III. It should be noted that the word *assumpsit* in this use did not mean "promised," and the action was not *ex contractu* but purely *ex delicto*. This was as far as the law ever went in making the action on the case, in its original form of an action for a tort, applicable to mere omissions.

Duty of an undertaker.

Breach of simple contracts.

By what reasoning it was concluded that a promise on a valuable consideration to do an act was a sufficient undertaking to support an action on the case on an *assumpsit*, is not perhaps easy to understand. But by about the time of Elizabeth that principle had gained recognition, and then or soon afterwards the action of *assumpsit*, as a distinct form of action, was established in use. *Assumpsit* was an action to recover unliquidated damages for the breach of a promise not under seal made upon a valuable consideration, *i.e.* of any simple contract But at this point the action had changed its character. *Assumpsit* was not an action for a tort but on a contract; so that an entirely new class of legally binding contracts were thus created, namely,

The action of *assumpsit*.

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[29] See § 880.

simple contracts that did not give rise to debts, in which were included all bilateral simple contracts. This action, however, was strictly confined to simple contracts; it never lay on a contract under seal, for which covenant remained the appropriate form.

Simple contract debts.

927. Just as trover superseded detinue, so *assumpsit* superseded debt on simple contract, and for the same reason, namely to avoid the wager of law. The courts held not only that the existence of a simple contract debt was a sufficient consideration to support a promise to pay it,[30] if the debtor chose to make such a promise; but also that when the debt came due the law would imply a promise on his part to pay it on demand. Thus arose the class of purely fictitious or *quasi* contracts mentioned in § 375. This gave rise to a peculiar form of the action of *assumpsit*, known as *indebitatus assumpsit*, in which the plaintiff alleged first the existence of a simple contract debt due from the defendant to himself and then a promise or contract by the defendant, in consideration thereof, to pay it on demand. The promise was a mere fiction, but the debt must be an actual common law debt, usually an obligation from the reception of a benefit or the holding of a fund, which kinds of obligations are of older standing in the law than the fictitious contracts based upon them. This kind of *assumpsit* was also known as general *assumpsit*, while the ordinary form of the action, in which no debt was alleged and the promise was usually an actual one, was called special *assumpsit*.

Indebitatus assumpsit.

General and special *assumpsit.*

There were several varieties of *indebitatus assumpsit*, the differences between which depended upon the manner in which the debt was created. *Assumpsit* for goods bargained and sold or for goods sold and delivered lay by the seller of goods against the buyer for the price, and *assumpsit* for work and labor was for wages, salary or compensation for personal services, the debt in those cases being an obligation which arose from the reception of a benefit as mentioned in § 758. If there was an actual contract to pay for the goods or services, an action of special *assumpsit* might be brought on that contract. *Assumpsit* for money paid, or more fully, money paid, laid out and expended by the plain-

Goods sold.

Work and labor.

Money paid.

[30] See § 364.

tiff to the use of the defendant at his request, was used where the debt was created by the plaintiff having paid out money for the defendant in such circumstances that the defendant was under an obligation to make reimbursement. If it was actually paid at the defendant's request, the obligation was the one in § 758 from the voluntary reception of a benefit, if not, it was an obligation as in § 759 or § 760; but in this latter case it was said that there was an implied request by the defendant, the common law never having openly and directly recognized the existence of meritorious obligations, but only indirectly by means of the fiction of an implied request on the part of the obligor, and a request by the defendant always had to be alleged. *Assumpsit* for money had and received, or more fully, had and received by the defendant to the use of the plaintiff, was the proper form when the debt took its rise, as in § 761, from the defendant's holding a fund which properly belonged to the plaintiff.

Money had and received.

Not only was a promise to pay implied from the existence of a simple contract debt, but every acknowledgement of its existence by the debtor raised a fresh implied promise. It was on this principle that an acknowledgement was held to be sufficient to take a debt out of the statute of limitations, and start a new period of limitation,[31] and that from the statement of an account, which showed a balance of indebtedness from one party to the other, a promise was implied to pay the balance, on which an action of *indebitatus assumpsit* would lie.

Acknowledgement of a debt.

Account stated.

928. In a penal action[32] if the plaintiff is not entitled to receive the entire penalty but a portion of it is go to some one else, as where half the penalty is given to the informer who sues and the other half to the township or county, it is called a *qui tam* action, because it is necessary for the plaintiff to allege in his pleading that he is an informer who brings the action as well (*qui tam*) for another's benefit as for his own.

Penal actions.

Qui tam actions.

929. Remedies by special writs are next to be considered. Only some of the more important ones can be noticed here. Certain of these are known as prerogative writs, having been

Special writs.

Prerogative writs.

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[31] See § 888. [32] See § 765.

originally in the nature of extraordinary remedies granted not as a matter of course but by a special exercise of the royal authority or prerogative. But at the present day they are obtainable of right, and must be granted upon a proper application. In many places the application for such a writ has to be made by the attorney general or other public law officer, nominally on behalf of the Crown or the public. If, however, the writ is needed for the protection of the rights of a private person, the attorney general will proceed at the request, or, as it is technically expressed, on the relation (*ex relatione*), of such person, who is then called the relator, and is responsible like a plaintiff for the costs and charges of the proceeding. In most places, however, the matter has been simplified by permitting the party interested himself to apply for the writ in the name of the state without the consent of the attorney general, or even in his own name. The prorogative writs here to be described are the writs of *procedendo*, *mandamus*, prohibition, *habeas corpus*, and *quo warranto*. These were originally issuable in England only by the court of King's Bench, which in a special manner represented the King himself.

The relator.

Procedendo.

930. If an inferior court refuses to decide a case before it, which it ought to decide, a superior court may issue a writ of *procedendo ad judicium*, commanding it to proceed and give judgment. But the writ can not specify what judgment the inferior court must give or for which party, that being a matter for that court itself to decide. This writ is now nearly obsolete, the writ of *mandamus*, next be mentioned, being preferred.

Mandamus.

931. A *mandamus* is a writ issued by a superior court to an inferior court or judge, to a public officer or an officer of a corporation or to the corporation itself, commanding the respondent to do some act which in his official or corporate capacity he is bound to do for the complainant; *e.g.* to a lower court to compel it to decide a case, to a registrar of deeds to compel him to record a deed, to a railroad company ordering it to stop its trains at a certain station. But no *mandamus* will lie to compel the doing of an act which the respondent has a discretion to do or not to do, or to control the exercise of his lawful discretion. Thus a superior court can not compel

Matters of discretion.

an inferior one to give such a judgment as the superior tribunal thinks proper to be given, nor, if the authorities of a city are under a general duty to lay out such new highways as the public convenience may in their opinion require, can a court interfere and compel them to lay out a street in any place where it seems to the court to be needed, the power to decide what streets are needed being vested exclusively in the city authorities. A *mandamus* also is not the proper remedy for enforcing the performance of a purely private duty, such as the duty to pay a debt or to abate a nuisance, but the injured party must resort to his action.

Private duties.

932. If an inferior court attempts to take cognizance of a matter of which it has no jurisdiction, as if, for instance, a court having only civil jurisdiction should attempt to try a man for a crime or a court of admiralty should entertain a suit on an ordinary contract, or if in a proceeding within its jurisdiction the lower tribunal is proceeding in a manner contrary to law, a superior court will grant a writ of prohibition forbidding it to proceed. But this writ will not lie to prevent a merely erroneous decision, as for instance if the inferior court were about to decide for the plaintiff when it ought to decide for the defendant. It has jurisdiction to decide, and any error in its decision should be corrected by an appeal.

Prohibition.

Will not lie to correct errors.

933. The writ of *habeas corpus*, which Blackstone calls the most celebrated writ in the English law, is a writ directed to any person, whether the sheriff, a jailor or any public officer or a private person, who holds another in imprisonment or custody, ordering him to have the body of the prisoner before the court. The person to whom the writ is directed is required actually to produce the prisoner in court. There are various kinds of writs of *habeas corpus*, some one of which may be used whenever the presence of a prisoner is required in court for any purpose. If for instance he is needed as a witness, he may be brought in by a writ of *habeas corpus ad testificandum*.

Habeas corpus.

Habeas corpus ad testificandum.

But the great writ of personal liberty, which is usually called simply a *habeas corpus*, is the writ of *habeas corpus ad subjiciendum*, by which the person detaining the prisoner is

Habeas corpus ad subjiciendum.

ordered to produce him, with the day and cause of his caption and detention, *ad faciendum, subjiciendum et recipiendum*, to do, submit to and receive whatever the court shall consider in that behalf. When the prisoner is brought in, the court will inquire into the matter, and if the imprisonment is unlawful, will set him at liberty, if lawful, will admit him to bail in a proper case or will remand him to custody again. A person can be set free on *habeas corpus* only when the imprisonment is unlawful, when it amounts to false imprisonment. If he is held under the mandate of a court, the imprisonment is lawful unless the mandate is void, even though it be erroneous. Therefore if a person is tried for a crime and, though really innocent, is unjustly convicted and sentenced to imprisonment, he can not have relief by a writ of *habeas corpus*, his proper remedy being by an appeal from the erroneous judgment. But if the imprisonment is really unlawful, he will be set free although it is under the mandate of a court or by the order of any public officer, even the King or President.

Only for unlawful imprisonment.

Habeas corpus was an old common law writ; but originally it seems to have been regarded as grantable at the discretion of the court, which in the time of the struggle for liberty under the Stuart kings was made by the judges a ground for refusing the writ or vexatiously delaying decisions and so permitting persons to remain illegally imprisoned. These evasions gave rise to a clause in the petition of right in the reign of Charles I, and finally to the famous *habeas corpus* act of 31 Charles II, by which the writ is made a matter of right and a prompt decision is secured. There are similar statutes in the United States. In times of war and civil disturbance the legislature sometimes temporarily suspends the writ of *habeas corpus*, the effect of which is to confer upon the government the power to arrest and imprison without trial, as a measure of precaution, persons who are regarded as dangerous to the state. But this does not take away the remedy for ordinary false imprisonments. The constitution of the United States and those of the several states provide that the writ shall not be suspended except when in cases of rebellion or invasion the public safety may require it.

Habeas corpus at common law.

The *habeas corpus* act.

Suspension of the writ.

The custody of persons.

The writ of *habeas corpus* may also be used to obtain the custody of a person to whose custody the complainant is entitled; thus a father may by this means regain the custody of his child, or a guardian of his ward, from any one who has taken the child away or unjustly detains him.

Quo warranto.

934. A writ of *quo warranto* was a writ of right on behalf of the King against a person who usurped any franchise or public or corporate office, or who having rightfully such franchise or office had forfeited it by non user, misuser or breach of any condition, to inquire by what warrant the defendant held the office or franchise and to oust him from it. But the proceedings on this writ, as on writs of right generally, being long and inconvenient, it is now generally disused, and an information[35] in the nature of a *quo warranto* has taken its place, and is what is now generally meant when a *quo warranto* is spoken of. This was originally a criminal or *quasi* criminal proceeding to inflict a fine upon the usurper; but the fine is not now enforced, and a *quo warranto* has become a mere civil proceeding to try the right. It is the usual mode in the United States of trying the right to public administrative offices and of settling disputes about elections to such offices. It can not be applied to elections of members of Congress or state legislatures, because the national and state constitutions confer upon those bodies the exclusive right to pass upon the elections and qualifications of their members, nor in England to the election of a member of Parliament. It is doubtful whether a *quo warranto* will lie to determine the right to be president of the United States or governor or of a state.

Information in the nature of a *quo warranto*

Certiorari.

935. A writ of *certiorari* is a writ from a superior court directed to an inferior court or to a public officer or board of officers, ordering them to cause to be certified to the court issuing the writ their proceedings in some matter, under which they are required to return to the court a full statement in writing of what they have done. It is a generally applicable remedy when the court has jurisdiction to review the proceedings and no other method is provided of getting the matter before the court. It is often used in connection with a writ of *habeas corpus* to obtain for the court fuller information as to the grounds of the imprisonment.

[35] See §§ 940, 1254.

Private writs.

936. Certain writs granted on the application of private persons for the protection of liberty and property are next to be noticed.

Mainprize.

The writ of mainprize (*manucaptio*) is a writ directed to the sheriff, when a person is imprisoned by him on a charge of crime and is entitled to bail, commanding him to take securities for the prisoner, called mainpernors, and set him at large. Mainpernors differ from ordinary bail in that they have not the power, which bail have, to surrender their principal at any time and so free themselves from their obligation for his appearance, and also in that bail are only sureties for his appearance to answer the specific matter for which they have stipulated, while mainpernors are bound to produce him to answer any charge which may be made against him.

De ventre inspiciendo.

When a tenant in fee simple died leaving a widow and an heir who was not a son or the representative of a son, and the widow declared herself to be with child by the deceased tenant, which child if born would be heir in exclusion of or jointly with the existing heir, the latter was entitled to a writ *de ventre inspiciendo* against the widow, under which the court ordered her to be examined by a jury of twelve matrons to ascertain whether she was really pregnant.

Estrepment.

At common law if a person had recovered judgment in a real action but had not yet got possession of the land, or by the statute of Gloucester passed in the reign of Edward I, if he had begun such an action, and had reason to apprehend that the tenant would commit waste upon the land, he could procure from the court a writ of *estrepment*, directed either to the tenant forbidding him to commit waste, or to the sheriff commanding him to prevent the tenant from doing so.

These writs obsolete.

The three last mentioned writs have now fallen into disuse. Mainprize has been superseded by *habeas corpus*, under which the prisoner may be bailed, and *estrepment* by the equitable writ of injunction.

Scire facias.

937. *Scire facias* is a writ directed to the sheriff, commanding him to notify a person, "make him know," that he is to appear before the court on a day specified in the writ and show cause why some order should not be made against

him. It is used for a variety of purposes, some of which will be mentioned hereafter.[36] To show cause is a common technical expression meaning to give reasons or make a defence. As a general rule a court will not make an order affecting a person's rights without giving him a hearing and an opportunity to present any objections which he may have against the order. This is called showing cause. When an order is asked for against a party in the course of an action or proceeding that is actually pending in the court, a writ of *scire facias* is not necessary. The party being in theory already in court, a simple order by the court to show cause is sufficient.[37] But when the court has power to make an order affecting the rights of a person who is not already before the court as a party, a *scire facias* is a very common method of bringing him before the court.

Remedies against the government.

938. For an injury committed by the King, or in the United States by the government or state, no action lies. But as the law assumes that the King or the government will not intentionally do any wrong, and that if he or it inadvertently injuries any one the injury will be redressed as soon as attention is called to it, it has provided ways for a private individual to obtain redress by what are practically suits against the state, but are put into the more respectful forms of petitions. At common law there were two forms of those proceedings.

Petition of right.

A *petition de droit* was used where the King was wrongfully in possession of property which belonged to a subject, and the right of the subject did not appear upon record. In that case the injured party presented a petition to the proper court, stating the facts on which the King's apparent right rested, which he must do fully and fairly, and also his own superior right. On this being endorsed or underwritten by the King with the words *soit droit fait al partie*, the court inquired into the matter. If the rights of the party were already matters of record, so that no farther inquiry was necessary, the proceeding was by *monstrans de droit*, which was a kind of petition not so fully stating the facts. If the right was determined against the King, a judgment of restora-

Monstrans de droit.

[36] See § 939, 1070, 1072, 1135.

[37] See § 1078.

tion was given, *quod manus domini regis amoveatur, et possessio restituatur petenti, salvo jure domini regis*, the last clause being a respectful form merely, by which judgment the petitioner was at once put into constructive possession of the property without any farther process to execute the judgment.

Remedies in favor of the government.

939. If the Crown, government or state suffers a civil injury from a private person, he or it may use the ordinary legal remedies by action or writ. However, as the King can not be disseized or ousted from real property, he can at common law maintain no action for a supposed ouster. There are also certain peculiar remedies available to the King or state.

Inquests.

Inquest or inquisition is a general name applicable to any inquiry conducted by means of a jury, even an ordinary trial by jury. An inquest of office is an inquiry conducted by some public officer *virtute officii* or under a special writ or order from the King or chief executive, or by commissioners specially appointed for that purpose, with the aid of a jury, concerning any matter that entitles the King or state to property. Thus if property escheats or is forfeited to the Crown or the state, or a tenant for life dies and the King or the state is entitled in reversion or remainder, or in other like cases, the Crown or the state, for fear of doing wrong, will not take possession until the right has been ascertained by an inquest. At common law the jury on such an inquest need not consist of twelve men or of any definite number.

Inquest of office.

Effect of an inquest.

If an inquest in a matter of real property be found for the Crown or state, he or it is at once put into legal seizin and any other person claiming any right is ousted. But as such other person is not usually a party to the proceeding and therefore has no opportunity to defend his rights, the inquest is not conclusive upon him, but he may still assert his claim by a petition of right or *monstrans de droit*, or by a more expeditious statutory proceeding known as a traverse of the inquest, and recover the property.

Annulment of public grants.

When any grant from the King or the state has been made unadvisably, *i.e.* illegally, or obtained by any fraud, or the grantee has in any manner forfeited his right, a writ of

scire facias[38] will lie on behalf of the Crown or state to annul it. The grantee is summoned to appear and show cause why the grant should not be annulled; and if on a proper investigation it appear that it ought to be, the court makes an order annulling it. Charters of corporations which have been forfeited by non user or misuser may be annulled in this way. A *quo warranto* may also be used for the same purpose.

Informations.

940. An information is in its nature a personal action on behalf of the King or state.[39] It is begun not by a writ, as ordinary actions are, but by the attorney general or some proper law officer of the government filing in the court a written document stating that he "gives the court to understand and be informed" of the facts of the case. The respondent or defendant is summoned to appear, and the case then goes on in nearly the same way as an ordinary action.

The most usual informations are those of intrusion for trespasses committed upon land of the King or the state, and of debt. There are also what are called informations *in rem*, for the appropriation of unclaimed goods which belong to the Crown or the state, such as wreck or treasure trove, or to seize and confiscate goods for crime, for example smuggled goods.

Informations *in rem*.

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[38] See § 937.

[39] There is also a criminal information; see § 1254.

CHAPTER LXI.

REMEDIES IN THE CIVIL LAW COURTS.

Equitable remedies.

941. The remedies which may be had in courts of equity are, as has been said, either for the enforcement of purely equitable rights and duties, on which there are no remedies at law, or for the better protection of legal rights. They are nearly always specific. It is very rare that damages can be recovered in equity. Even where the court decrees the payment of a sum of money, this it is not generally by way of damages but in specific performance of an obligation to pay. When a wrong-doer has made a profit by his wrongful act at the expense of another, a court of equity will often treat him as a kind of constructive trustee of the profits for the injured party and will compel him to account for them to the latter. The case of a trustee who makes a profit for himself out of the trust property has been already mentioned. So in cases of infringements of patents, copyrights and trademarks, it is now usual for the owner, instead of suing at law for damages for the infringement, to sue in equity for an account of the profits which the infringer has made. The court will take an account, and order the payment of the sum ascertained by the accounting. This is practically an award of damages, but theoretically it is the specific enforcement of a constructive trust and is different from damages. The amount so recoverable is also not always the same as would be given for damages at law.

Are generally specific.

Account of profits.

Exclusive jurisdiction.

942. The jurisdiction of equity has been divided into the exclusive, concurrent and auxiliary jurisdictions. The first is where there is no remedy at all at law, so that relief can be had only in equity, as in all cases of express or fiduciary trusts, and formerly of relief against penalties and forfeitures. The concurrent jurisdiction covers all those cases where, though a party might have a remedy at law, he may also resort to equity, as for instance in cases of fraud, where though there is usually a legal remedy, equity, by creating and enforcing a constructive

Concurrent jurisdiction.

trust, can often give a better remedy, and in many cases of accident and mistake. So although an action of account will lie at law, accounts are generally more conveniently settled in equity. Formerly when an action had been brought or was expected to be brought at law, the parties sometimes found it necessary to invoke the aid of equity in procuring evidence for use in the legal action, as will be presently explained. This was the auxiliary jurisdiction of equity.

Auxiliary jurisdiction.

943. It is said that while legal remedies are of strict right, equitable ones are discretionary and of grace. In the beginning this was literally true. When a person finding himself unable to get justice in the courts of common law applied to the King for relief, it lay entirely in the option of the King whether or not to interfere in the matter; and if he did interfere, he granted such relief as he thought fit. There are still some cases where the court has power to grant or refuse a remedy in its discretion. But generally at present a person has just as good and imperative a right to an equitable remedy in a proper case as to a legal one. Courts of equity are as much bound to hear causes and to administer justice as courts of law. Nevertheless equitable remedies have a discretionary character in two important respects.

Equitable remedies discretionary.

First, the precise form and extent of the remedy can seldom be marked out beforehand by rules. Equitable remedies are molded and fitted to the exact circumstances of the case, and are not, like legal ones, cast into a few simple forms; so that, although the party's right to some remedy may be clear, exactly what remedy he shall have must to some extent be left to the discretion of the judge. Judges however ought not to exercise their discretion capriciously or arbitrarily according to their own private notions of right or expediency, but according to general principles and analogies found in the law.

Form of equitable remedies

Judicial discretion.

944. Secondly, courts of equity have power, which courts of law have not, to grant relief upon terms or conditions. They will generally refuse a remedy to a party who applies for it, unless he will consent to do what is just and equitable on his part, even though that be something which he is under no perfect legal duty to do. In that way the court can often

Relief upon terms.

coerce a person to do something which he ought to do but which the court has no power directly to order him to do. This principle is expressed in the maxim: "he who seeks equity must do equity." Illustrations of it are found in the treatment of the usury laws in equity, where a debtor is compelled to pay what he justly owes before he can get back his security,[1] and in the rule of equity requiring payment for improvements made on land by a *bona fide* possessor when the true owner seeks to take back the land,[2] which have been already mentioned.

He who seeks equity must do equity.

Coming with clean hands.

945. A very similar principle is expressed in the rule that he who comes into equity must come with clean hands, that is, he must not seek the aid of the court in perpetrating a fraud or wrong upon others. For instance if a person's trademark is wrongfully used by others, he may generally have an injunction in equity to prevent the infringement. But the court will refuse the injunction if the plaintiff's trademark, for which he seeks protection, itself contains a false representation calculated to deceive and defraud the public, *e.g.* if a trademark for cigars made in New York represents them to be Havanna cigars.

Remedy at law.

946. Since the whole jurisdiction of equity is only supplementary to the common law, it is a fundamental principle that equity will never interfere when the party has an adequate remedy at law. When the right to be enforced is a purely equitable right, there is never any remedy at all at law, the courts of law refusing to take any notice of such rights Therefore an action will always lie in equity to enforce a trust; and the court will order the trustee to do what he ought to do or will forbid or enjoin him from doing what he ought not to do, or in the case of an equitable lien will order a judicial sale of the property subject to the lien and the payment of the debt out of the proceeds.

Equitable rights.

Legal rights.

But a large part of the business of the courts of equity is to enforce and protect legal rights, for whose violation the law always furnishes some sort of a remedy. Here equity will not interpose unless the regal remedy is plainly inadequate and the court of equity is able to give a different and better remedy. Therefore an action will not generally lie in equity to recover the

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[1] See § 767. [2] See § 788.

possession of land or of a chattel, to enforce the payment of a debt or to recover damages for a tort or for the breach of a contract, nor a prosecution to punish a person for a crime, because in all those cases the legal remedy is adequate

Particular remedies.

947. The most important particular kinds of equitable remedies are the following.

Specific performance.

For the breach of a contract the only remedy at law is an action for damages. But in cases where this would not be an adequate remedy equity will specifically enforce the contract by ordering the party to do the very thing which he has contracted to do[3] This applies mostly to sales of land. If the seller of chattels refuses to deliver them, the buyer will usually be fully compensated for the wrong done him by pecuniary damages. If he does not get the particular chattels that he has bought, he can buy others just as good elsewhere. But each piece of land has its own individuality. If a man buys a piece of land, he wants that particular piece and no other. Therefore equity will generally enforce specifically a contract for a particular piece of land. Even in the case of a chattel when it is of a unique character and can not be replaced, the same will be done, as in a contract for the sale of a picture by a famous artist. So if such a chattel is wrongfully detained from the possession of the owner and concealed, so that it can not be replevied at law, a court of equity will decree its restoration. But a contract which can be performed by the mere payment of money will not be specifically enforced. Nor will a contract for personal services, because the court can not oversee the performance of the services so as to know whether they are properly done. But when an artist or some person of special skill, whose services have a unique value and can not be replaced by the services of another person, agrees to render services exclusively for one person for a fixed time, equity will enjoin him from working for any one else during that time. Thus if the proprietor of a theatre engages a famous actor for a year to perform in his theatre exclusively, although the court will not attempt to compel the actor to play there, it will enjoin him against playing any where else.

Sales of land and chattels.

Delivery of chattels.

Contracts to pay money.

Contracts for personal services.

[3] As to the specific performance of contracts as a means of taking them out of the statute of frauds, see § 335.

Injunctions.

948. An injunction is a writ or order issued by a court of equity forbidding a person to do something which he ought not to do. It is a preventative remedy, and on account of its convenience has now generally superseded all the old preventative remedies of the common law. An injunction will not issue to command a person to do an act, but only to forbid him; except that a person who has made or is maintaining a nuisance may be forbidden to permit it to remain, which is equivalent to commanding him to abate it, and in a few cases a person who is pursuing a course of conduct may be forbidden to discontinue it, for instance a railroad company may be ordered not to cease stopping its trains at a certain station. This is called a mandatory injunction. The specific enforcement of a contract or a trust may take the form of an injunction against its breach. But generally an injunction can not be granted to prevent a breach of contract or the commission of a tort for which pecuniary damages would be an adequate remedy, such as an ordinary trespass to land or the conversion of a chattel. But a trespass involving irreparable injury, which can not be compensated for by money, will be enjoined against, for instance cutting down old ornamental trees, demolishing an ancient building having historical associations or destroying a valuable work of art.

Mandatory injunctions.

Irreparable injury.

Personal injuries.

The general rule is that an injunction is a remedy for wrongs to property only, not for personal injuries. Therefore it will not be granted to prevent a battery, a libel or slander or a wrongful arrest, the legal remedies being deemed adequate. Recently, however, the courts of equity have granted injunctions against slanders of title or property.

Preventing a multiplicity of suits.

949. A frequent ground for the interposition of equity, generally by way of injunction, is the prevention of a multiplicity of suits. In the case of a continuing wrong [or nuisance,[4]] where the injured party may have a fresh action at law every day, and might have to bring many actions, he is permitted to sue once for all in equity and get an injunction against the further continuance of the wrong. The same principle applies to infringements of patents, copyrights and trademarks; and injunction against infringement is now the usual means of protecting such rights, actions at law being comparatively rare.

Continuing wrongs.

Infringement of patents *etc.*

[4] See § 871.

But here the jurisdiction of equity is based also partly upon the fact that the amount of damage likely to result from such wrongs can not be readily proved, so that the remedy at law is inadequate, and partly on the necessity of taking an account.[5] So if many different persons have a right to bring actions at law against the same party all involving the same question, a court of equity will sometimes entertain a single action to which all shall be parties to settle the question. Thus where the agent of a corporation charged with the duty of issuing certificates of stock fraudulently issued several hundred false certificates that did not actually represent any stock, and over a hundred of the holders of these sued the company at law for damages, the company was permitted to bring a suit in equity against all the plaintiffs at law and all other persons whom it suspected of having any of the false certificates, to have the court decide which certificates were genuine and which not, and to have the fraudulent ones cancelled; and injunctions were granted against the further prosecution of the suits at law.

Similar rights of action

950. In former times injunctions against legal proceedings were common. When a person was sued at law and had a defence which was valid in equity but not at law, he could not make that defence in the court of law, but had to go into equity and procure an injunction to stop the legal action. Thus if A were trustee of land for B, and B was in possession of the land, and A brought an action of ejectment against him, or if B had bound himself to A in a penal bond, had broken the condition of the bond and had afterwards paid or tendered to A a full compensation in money for the breach, but A nevertheless sued him for the full penalty; in both of those cases B would have no defence to the action at law, and A could recover against him at law the land or the penalty. But equity would grant an injunction against A for B's protection. This injunction was not, like a writ of prohibition, directed to the court in which the legal action was pending, forbidding it to proceed with the action. Courts of equity are not superior to courts of law, and can not directly interfere with their pro-

Relief against proceedings at law.

Equitable defences.

No injunction against the court.

[5] See § 941.

ceedings. It was directed to the plaintiff in the legal action, commanding him not to farther prosecute his action.

Stopping the enforcement of judgments.

951. So in a proper case equity may forbid the enforcement of a judgment which has been rendered at law. When after a trial at law a decision has been given against a party, and the defeated party afterwards discovers new evidence, which he could not by the use of due diligence have found in time to use it at the trial, and for any reason the court of law has not power to grant a new trial, a suit for what is called a new trial may be brought in equity. The court of equity will consider the new and the old evidence, and if it is satisfied that because of the absence of the new evidence at the former trial the decision was wrong on a question of fact, it will enjoin against the enforcing of that decision. But a court of equity will not interfere in this way merely because the court of law, on the evidence before it, made an erroneous decision; it will not attempt to set itself up as a court of appeal over the court of law.

New trials.

The modern law.

All these interferences of equity to grant relief against proceedings at law are now in most places obsolete, the courts of law having by statute the power to admit equitable defences in legal actions, to grant new trials and to give any sort of relief against their own acts that equity might formerly have given.

Accounts.

952. Taking and settling accounts, whenever the necessity for so doing arises, is a very important head of equity jurisdiction. Between two persons an action of account, when the claims on both sides were legal ones, lay at common law, though very rarely resorted to in modern times. But when there were more than two parties, as in settling up the affairs of a partnership composed of more than two persons or of a joint stock company, or when some of the claims were equitable, as in the accounts of a trustee with his *cestui que trust*, the jurisdiction always belonged exclusively to equity.

Creditors' suits.

953. When a person has recovered judgment against another at law, and the judgment debtor has not tangible legal property enough which can be taken on execution to satisfy the judgment, so that the execution is returned to the court that issued it unsatisfied, but the debtor has equitable or in tangi-

ble property, such as a fund held in trust for him, debts due to him, patents or copyrights, which the sheriff can not seize under a writ of execution, the judgment creditor may bring a suit in equity against the debtor, and if necessary against any third person who is trustee for him, owes him money or has his property in his hands, to have the property applied to the payment of the judgment. The court will order the property to be sold or the trust fund or debt to be paid into the court, and out of the proceeds will satisfy the judgment. This is called a creditor's suit or creditor's bill.

Interpleader.

954. Interpleader is where a person has a chattel or a fund or other property in his hands, in which he himself asserts no right, but he does not know to whom he ought to pay or deliver it, and two or more persons are claiming it from him. In such a case he may bring a suit in equity against all of the claimants, and have them enjoined from suing him at law and compelled to interplead, that is, to litigate their claims in the court of equity among themselves. Then the court, having decided who is entitled to the property, will order it to be paid or delivered to that person. If the property consists of money, the original holder may pay it into the court at the beginning of the action and get rid of all farther responsibility for it, and in case of other property the court will usually at his request or that of any party to the action appoint a receiver to hold it pending the action.

Other equitable remedies.

955. Relief against accidents, mistakes, penalties and forfeitures, the reformation of written instruments, the redemption and foreclosure of mortgages and the marshaling and administration of assets, are important forms of equitable remedies which have already been mentioned.

Fraud.

956. Fraud is a frequent ground of application to equity. Indeed the prevention of fraud is the ostensible ground upon which a very large part of the jurisdiction of equity is founded. The Chancellor first enforced uses because, as he declared, it would be a gross fraud for the feoffee to uses to hold the land and not perform the use; and the principle on which courts of equity take various contracts out of the statute of frauds is said to be that the court will not permit the statute which was

The prevention of fraud.

passed to prevent frauds to be used as a means of committing a fraud. In those cases, however, the word fraud is not used in its proper sense. Fraud in its legal meaning is a kind of unlawful conduct, *i.e.* conduct which is already forbidden by the law. But the very reason why equity assumed jurisdiction to suppress certain kinds of conduct was that they were not forbidden by the law but the Chancellor thought that they ought to be. They were acts which were morally dishonest, and were therefore called fraudulent. Had it not been for this confusion between moral and legal fraud, which enabled the Chancellors to cover up what was really judicial legislation of the boldest kind under the disguise of the prevention of fraud, it is doubtful whether the equity courts would ever have been allowed to grasp the large and beneficial jurisdiction which they now exercise.

Remedies for fraud.

957. Actions for damages for fraud should be brought at law. Fraud usually also has the same effect at law as in equity in invalidating juristic acts and in creating estoppels. But there are many cases where it is necessary or more convenient to resort to equity for relief against fraud. The most important are the following.

Actions for damages.

An action for damages may sometimes be brought in equity after it is barred by the statute of limitations at law, because of the difference in the times from which the statute begins to run at law and in equity.[6]

Rescission of juristic acts.

When a formal juristic act is necessary to be done to make effectual the rescission of a fraudulent transaction;[7] or it is necessary to have some written instrument containing the transaction cancelled, as where a bill of exchange or a promissory note has been obtained by fraud and may become valid if negotiated to a *bona fide* holder for value; or where the fraud is of a kind not recognized as fraud at law, which is true of most merely constructive frauds, such as obtaining a contract in certain cases by means of representations which are in fact false but not made with any actual fraudulent intent or by mere concealment, or in cases of undue influence not amounting to duress at law; rescission is most conveniently effected by a decree of a court of equity.

[6] See § 888. [7] See § 764.

Auxiliary jurisdiction.

958. At common law a party to an action could not himself give testimony as a witness[8] at the trial; but any admissions that he had made elsewhere about the matter in dispute could be proved against him. In equity on the contrary the plaintiff could compel the defendant to make a full and detailed written answer upon oath of all that he knew about the case.[9] Therefore a party to an action at law sometimes brought against his opponent a suit in equity at the same time about the same matter, merely for the purpose of obtaining his answer for use as evidence in the legal action. When the answer was got, the suit in equity was no farther proceeded with. This was called a suit or bill for discovery, and was allowed even in cases where, if the action had been carried on to its end, the court of equity could not have given any relief. Discovery also included the production of books and papers for inspection, which the court of equity could order to be done.

Discovery.

Taking testimony *de bene esse*.

959. If a witness whose testimony was needed in a trial at law was unable because of sickness or any other reason to come to court, or not being within the jurisdiction of the court could not be compelled to attend and refused to do so, the court of law had no way to obtain his testimony. But in equity the written depositions of witnesses were regularly taken before an officer appointed by the court and used in the court on the trial.[10] Therefore a suit in equity was often brought merely in order that the depositions, having been taken by the order of the court of equity, could be used in an action at law. Depositions taken for use in another proceeding are said to be taken *de bene esse*. This might be done even though the action at law was not yet begun For instance if A was tenant for life not paying rent, and B and C each claimed to be the remainderman, there was no way in which an action could be brought at law during A's life to settle the question. After A's death either B or C might enter and take possession, whereupon the other could sue him in ejectment and obtain a decision on the right. But in the meantime the witnesses on whose testimony the action of ejectment would be decided might die or disappear. Therefore

Perpetuation of testimony

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[8] See § 1093. [9] See § 1108. [10] See § 1097, 1110.

a suit between B and C could be maintained in equity before A's death to take the depositions of the witnesses and preserve them for use in a future action of ejectment. This was called perpetuating testimony.

This jurisdiction now extinct.

All this auxiliary jurisdiction of equity is now obsolete, parties being at present permitted to be witnesses, and the courts of law having been invested by statute with power to compel discovery and to take depositions.

Actions in admiralty.

960. Actions in admiralty are divided into actions *in rem* and *in personam*. An action of the former kind is one in which the nominal defendant is not a person but a thing, usually a ship or her cargo. That is, the action is brought not against the owners of the ship, but against the ship herself, as if she were a person. Of course the true defendants are the persons who have rights in the ship or goods, and any such person is entitled to intervene in the action and become a party to it for the purpose of protecting his rights. Therefore it is often said that all the world are parties to a suit *in rem*, and any disposal of the property made by the court in the action is binding upon all persons, whether they were actually parties to the suit or not, contrary to the general rule that the effect of a judgment is confined to parties and privies.[11] If property is sold under a decree of the court in such an action, the buyer at the judicial sale gets not only the rights of the parties to the suit, as at an ordinary judicial sale, but he gets a new and clear title, all former rights being wiped out by the sale.

Actions *in rem*.

Judicial sales.

Actions *in personam*.

An action *in personam* is one brought against a person or persons in the ordinary way. The division of actions now under considerations has nothing to do with the common law classification into real and personal. No real action can ever be brought in a court of admiralty, because those courts have no jurisdiction over land.

Remedies *in rem*.

961. The remedies given in actions *in rem* are specific. The most important are enforcing maritime liens by the sale of the property. But an action may be brought to recover the possession of a ship by a person who is entitled to its possession. Such an action may, be either possessory or petitory; though for a long

[11] See § 230.

ıe the English courts of admiralty did not entertain petitory ions. Actions *in personam* are always for money damages rely.

Remedies *in personam.*

962. The jurisdiction of admiralty depends partly upon the ject matter and partly upon the place where the wrong is ıe or the property is situated. As to subject matter, it extends the general maritime law to all maritime contracts and obligaıs, that is, contracts and obligations relating to navigation and ımerce at sea, such as contracts of affreightment and the obıtions of ships as carriers, general average, bottomry and *resdentia,* seamen's wages, towage and marine insurance, and ıll agreements and transactions from which maritime liens arise.)bably the English courts of admiralty in ancient times exerıd this jurisdiction in its full extent. But as those courts had trial by jury and proceeded according to the course of the l law, disregarding both the principles and the procedure of common law, they incurred the suspicion and dislike of liament and the common law courts. Certain statutes were sed in the reign of Richard II to restrict the jurisdiction in niralty; and as the court of Admiralty was technically an erior court and therefore amenable to writs of prohibition, court of King's Bench was enabled to construe the statutes its own way and to enforce its construction upon the court of niralty by means of such writs. In that manner by the e of Lord Coke[12] the common law courts had succeeded in ting the Admiralty of a considerable part of its ancient sdiction, including the subjects of affreightment and car;e, general average and marine insurance, and in restricting creation of maritime liens for services. A part of its old sdiction has however been restored to the Admiralty by recent ıutes.

Jurisdiction of admiralty.

As to subject matter.

Restriction of admiralty jurisdiction in England.

963. The American courts of admiralty have not considered nselves bound by the restrictions thus imposed upon the ;lish courts, but have exercised jurisdiction covering the whole l of the maritime law. At the same time the courts of mon law have retained all the jurisdiction which the English

Admiralty jurisdiction in the United States.

[12] See § 46.

Admiralty.

common law courts wrested from the Admiralty, the grant of jurisdiction to the national government in the constitution expressly reserving to parties their common law remedies; so that in many kinds of maritime contracts and obligations the two sets of courts have concurrent jurisdiction, and a plaintiff may resort to either at his pleasure.

Admiralty jurisdiction as to place.

964. So far as the jurisdiction of admiralty depends upon place, it is confined to navigable waters.[13] But in this case too the common law courts in England succeeded for a time in narrowing the admiralty jurisdiction by excluding from it such navigable waters as lay "within the body of a county," that is, generally harbors and rivers in England.

Jurisdiction of the *res*.

In an action *in rem* the *res*, *i.e.* the thing, which is to be made the defendant must be at the time of beginning the action within the territorial limits of the court's jurisdiction. Otherwise it is impossible to bring the action at all, since the thing can not be seized.

Wrongs committed at sea.

An action *in personam* will usually lie in admiralty to recover damages for a tort committed upon navigable waters, such as an assault and battery taking place upon a ship, or a collision between ships due to negligence. Whether the act complained of is a tort must usually be determined by the rules of the common law. That is, only the remedy belongs to the maritime law, the right being a legal one. The reason why the admiralty courts undertake to furnish remedies by way of damages merely for legal wrongs was that in ancient times the courts of common law, for reasons that will be explained hereafter,[14] were not competent to try any case that did not arise within the body of a county, so that the cognizance of these suits was forced into admiralty. That restriction on the powers of the common law courts has long since been done with, and actions *in personam* in this class of cases may now be brought either at law or in admiralty.

Remedies in the ecclesiastical courts.

965. Various remedies, compensatory or specific, may be had in the ecclesiastical courts in England for withholding eccle-

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[13] As to what waters are navigable, see § 527.

[14] See § 1099.

siastical dues or doing or neglecting some act relating to the church, whereby injury accrues to a person; for instance subtraction of tithes or fees due to the clergy, spoliation and dilapidation. But if in any such action a right of property comes into question, for instance who is the owner of the tithes or the advowson, the ecclesiastical courts are not permitted to pass upon the right, but the matter must be referred to the temporal courts. Suits for such remedies are called pecuniary causes. Pecuniary causes. Rights of property.

Matrimonial causes include actions for jactitation of marriage, to enjoin the offending party from continuing his false assertions; actions by one party to an informal marriage to compel a formal celebration *in facie ecclesiae*,[15] or even to compel a marriage in pursuance of an agreement or contract to marry, which latter kinds of actions are now abolished by statute; suits for restitution of conjugal rights, brought to compel the resumption of cohabitation when either husband or wife wrongfully deserts the other and lives apart, which is a kind of subtraction of matrimonial services; and suits for divorce and the annulment of marriages. Matrimonial causes.

Testamentary causes are concerned with matters of probate and administration, and have already been sufficiently described. Testamentary causes.

966. In England, as has been already explained, the jurisdiction in matrimonial and probate causes was some time ago taken from the ecclesiastical courts and given to secular tribunals,[16] and is now vested in the Supreme Court of Judicature.[17] The present jurisdiction in England.

In the United States there are no ecclesiastical courts. Pecuniary causes can not arise there, because, there being no state church, the wrongs for whose redress they are provided can not be committed. The only matrimonial actions are suits for divorce and for the annulling of marriages, which in most states are brought in the courts of equity, though in a few the jurisdiction belongs to the courts of probate. Possibly the same courts might entertain a suit for jactitation of marriage or for restoration of conjugal rights, but probably not. Testamentary causes come into the courts of probate. The jurisdiction in the United States.

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[15] See § 971. [16] See § 198. [17] See § 199.

SUB-DIVISION V. ABNORMAL PERSONS.

CHAPTER LXII.

HUSBAND AND WIFE; MARRIED WOMEN.

Domestic relations.

967. The relations of husband and wife, parent and child, guardian and ward and master and servant are called collectively the domestic relations.

Disabilities to marry.

968. All persons may marry who are not under disabilities. Disabilities to marry are either civil or canonical. Civil disabilities are created by the rules of the common law; their effect is to make the marriage either void or voidable by the mere act of the parties without the decree of any court. Canonical disabilities depended originally upon the canon law. Formerly their effect was to make the marriage voidable by the decree of an ecclesiastical court in a suit brought by one party against the other to annul the marriage. If not so annulled during the life time of both parties, the marriage was valid. At present some of the old canonical disabilities have been abolished, some make the marriage entirely void and some make it voidable by the decree of a competent court. In most places this is now regulated entirely by statutes, which have more or less changed the old law. If a marriage is annulled either by the act of the parties or of the court, it becomes void *ab initio*, and the children are bastardized, which is a very harsh rule.

Civil disabilities. Former Marriage. Nonage.

969. The first civil disability is being already married; a person may not have two husbands or wives at the same time.

Nonage, or want of age, is another civil disability. The age of consent at common law is fourteen for a boy and twelve for a girl; but in some places these ages have been raised by statute. If either of the parties is under the age of consent, the marriage

is so far void that either party may declare it void and may separate, if he or she chooses, without any divorce or decree of nullity from a court. But if they continue to live together after both have reached that age, it is a valid marriage and they need not marry over again.

Want of reason in a party will make a marriage void, as will be more fully explained in another place.[1] Want of reason.

The consent of parents or guardians is not necessary to the validity of a marriage, no matter how young the parties are. But persons contracting marriages with young girls without the consent of the girl's parent or guardian are in some places by statute punishable as for a crime. Consent of parents.

970. The canonical disabilities are as follows. Precontract, or being engaged to marry another. This is not now a disability; though the breach of a contract to marry is a ground for an action at law for damages like the breach of any other contract. Canonical disabilities. Precontract.

Near kinship between the parties. All marriages between lineal kin are forbidden, and between collateral kin usually as far as the third degree reckoned by the rule of the civil law. Thus a man may marry his first cousin, who is related to him in the fourth degree, but not in most places his niece, who stands one degree nearer. Marriages within the prohibited degrees are incestuous,[2] and are now wholly void, not merely voidable. Relationship by affinity under the canon law continued after the death of the husband or wife, and was a bar to marriage equally with consanguinity; so that a man could not validly marry his deceased wife's sister. But at common law affinity was regarded as terminating with the death of either party, and such a marriage would not have been illegal. In England, however, the canonical rule has been adopted by statute and the disability made a civil one. In the United States no such disability exists, and the marriage of a man with his deceased wife's sister is valid as at common law. Relationship. Affinity.

Confirmed and incurable impotence existing at the time of the marriage was a canonical disability. At present it generally makes the marriage voidable. Impotence.

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[1] See § 1012. [2] See § 1165.

Fraud and coercion.

The general rule that fraud or coercion vitiates an agreement applies to marriage, but with some limitations. The fraud must be a misrepresentation made with an actual fraudulent intent and about some material fact relating to the party and his or her fitness for the married state. A woman could not have her marriage annulled because her husband had deceived her about the amount of his property or his previous amours with other women. The concealment of corporial infirmities is sometimes treated as a kind of fraud.

Marriage is an agreement.

971. Marriage is an agreement, and like other agreements requires the consent of the parties; *consensus, non concubitus,*

Form of the agreement.

facit nuptias. By the old law the mere agreement of the parties, without any other forms whatever, if made to take effect immediately, or as the technical expression is, *per verba de presenti,* or if made to take effect in the future, *per verba de futuro,* but followed by sexual intercourse, which is called consummation, was deemed so far a valid marriage that the parties might be compelled by the ecclesiastical court to celebrate a formal marriage *in facie ecclesiae.* In some of the United States such a marriage by mere agreement, which is there called a common law marriage, is entirely valid, and no subsequent formal marriage ceremony is necessary or can be compelled. But in most places, by statute, a

Celebration of the marriage.

marriage must be celebrated before a clergyman or magistrate. The parties acknowledge in the presence of the celebrant their intention to marry, and he pronounces them husband and wife. In

Statutory requirements.

order to prevent frauds and to perpetuate evidence of the marriage various formalities, such as having the banns, *i.e.* a formal notification of the intended marriage, published in some appointed church before the marriage, procuring a marriage license from some public office, the presence of witnesses at the marriage, the giving a written certificate of marriage to the parties by the celebrant, or the recording the marriage in a designated public

Effect of non-observance.

office, are prescribed by statutes almost everywhere. The statutes sometimes make the marriage invalid if their requirements are not observed; but generally the marriage is valid, but the persons disobeying the statute are liable to punishment.

Law of place.

As to form, the rule is that a marriage which is valid by the law of the place where it is contracted, *lex loci contractus*

or *celebrationis*, is valid every where, without regard to the residence of the parties. The same is generally true as to their capacity to marry, but to this there are some exceptions, and the law is in a somewhat unsettled state.

Dissolution of marriage.

972. A marriage is dissolved by the death of either party or by divorce. Divorce is either limited, *a mensa et thoro*, which is also called a judicial separation, or absolute, *a vinculo matrimonii*. The former is granted for various kinds of misconduct committed by one party after marriage, which at present are enumerated by statute, such as cruelty or desertion, or by the old law adultery. The parties continue to be husband and wife, so that neither is at liberty to marry again, but they are permitted to live apart from each other, and the husband loses his right to his wife's services In most of the United States limited divorces are not granted.

Divorce.

Limited divorce.

Divorce *a vinculo* is a complete dissolution of the marriage, so that the parties cease to be husband and wife and may contract other marriages, except that at present the guilty party is sometimes forbidden to marry again during the life of the other or for a certain number of years. By the old law such a divorce was only granted for some canonical impediment existing before the marriage; misconduct after marriage, however gross, was at the most ground for a judicial separation, though the legislature occasionally by private statutes granted absolute divorces for such misconduct. A judicial divorce *a vinculo* took the form of a decree of nullity, making the marriage void *ab initio*. The modern law, however, distinguishes between a decree of nullity and a divorce, which latter is granted for misconduct after marriage, and only dissolves the marriage from the time of the decree, so that the children of the marriage continue to be legitimate. The grounds on which a judicial divorce *a vinculo* may now be had are prescribed by statute, and are very different in different places. Adultery is usually a sufficient ground, and in some places the only sufficient ground, for an absolute divorce; but in England adultery on the part of the husband is not, unless aggravated by other misconduct. Cruelty, desertion, habitual drunkenness and other sorts of misbehavior are among the causes for which divorce is sometimes allowed; and in some of the United States certain

Divorce *a vinculo*.

Under the old law.

The modern law.

Grounds of divorce.

impediments existing before marriage are treated as grounds for divorce rather than for a decree of nullity. Everywhere, however, the principle is adhered to that divorce shall only be permitted for some sufficient cause, and not at the mere pleasure of the parties.

Divorce only granted to an innocent party.

973. An application for divorce must be made *bona fide* by an innocent party against a guilty one. Even though a cause of divorce exists, yet the divorce will be refused if the party asking for it has also been guilty of like misconduct, or if the

Collusion.

suit is collusive, *e.g.* if a wife were to arrange with her husband that he should commit adultery in order that she might sue him for a divorce which both he and she desired to have granted.

Condonement.

When one party has been guilty of misconduct which would justify a divorce, the other may forgive or condone it, after which no divorce will be granted. Condonation may be express or implied from conduct. Sexual intercourse with his wife with knowledge of the existence of a ground for divorce is a condonation on the part of the husband. He ought not so to use the woman unless he intends to keep her as his wife. On the part of the wife sexual intercourse is not always conclusive on the point, because she may not be in a position to refuse it. But it is strong evidence of an intention to condone, and if shown to be voluntary is conclusive.

Alimony.

Alimony is an allowance in money which a party against whom a divorce is granted may be ordered to pay to the other for his or her support. It lies in the discretion of the court, and its amount will depend upon the circumstances of the case, especially upon the pecuniary condition of the parties. It is given almost as a matter of course to a wife who obtains a divorce from her husband, and may be awarded to a husband against his wife if he is poor and she rich. When a wife sues for a divorce and is without means to carry on the suit, the court will sometimes compel the husband to pay her a sum of money for that purpose before the decision of the case. This is called alimony *pendente lite*.

Custody of children.

When there are children, the court has discretion to award their custody to either parent or to divide them between the parents, as it thinks best. The interests of the children rather

than the rights or wishes of the parents should guide the decision of the court. But other things being equal, the claim of the father is somewhat stronger than that of the mother. However very young children are usually committed, at least temporarily, to the care of the mother, and when there are a number of children, they are generally divided between the parents, with a certain preference for giving boys to the father and girls to the mother

Husband and wife.

974. Husband and wife are called in the old books baron and *feme*. A married woman is *feme covert, foemina viro co-operta,* and her condition during marriage is coverture. A single woman is *feme* sole. For some purposes under the old law it was said that the husband and wife were looked upon as being but one person in law; but this seems to be a mere metaphor of no practical use. The wife, however, takes her husband's family name, nationality and domicile.

Rights and duties.

By the marriage the parties acquire certain rights *in personam* against each other, in correspondence with which they owe to each other certain duties, and also certain rights *in rem* in each other and in each other's property, as to which duties are owed to them by third persons, and the wife comes, or formerly came, under certain disabilities.

The wife's duties.

975. As to rights between the parties: the wife is bound to live with her husband in such place as he selects, to obey his lawful and reasonable commands, to render him reasonable services, especially in domestic matters such as the care of the house and of the children, and to allow him reasonable sexual intercourse. At common law, if she worked for another person, he was entitled to her wages. These duties and the husband's corresponding rights seem to be at present imperfect ones. The husband can not have any action against his wife, nor can he imprison her to compel her to live with him or punish her for disobedience or misconduct. At common law a man might inflict corporal punishment upon his wife; as the old books say, *flagellis et fustibus acriter verberare;* but such conduct by the husband would now be illegal and in many places a sufficient ground for divorce. At

Her wages.

Her duties imperfect ones.

common law he, being responsible for wrongs committed by his wife, might use necessary force to restrain her from committing them; but at present the responsibility no longer exists, and therefore probably not the power.

The husband's duties.

A husband must permit his wife to live with him, and must support her and furnish her with necessaries according to his means and station in life. She can not sue him for non-support, though in some cases by statute a court on her complaint or that of the public authorities will compel the husband to make her an allowance for her support, and in some places a wilful refusal to furnish support is a ground of divorce. Also if he neglects to furnish her with necessaries, she may buy them on his credit, and he may be sued for the price. Necessaries mean food, clothing, shelter and medical attendance, of such kind and quality as are reasonably suitable to the husband's financial and social position, not merely what is absolutely requisite to support life; but they do not include luxuries or the means of gratifying aesthetic tastes. Probably religious privileges to a reasonable extent are necessaries, which might include pew-rent.

Necessaries.

Property rights.

976. Husband and wife have certain rights in each other's property. If real property is given to them in such a way as, if they were not married to each other, would make them joint tenants, they are said to be tenants by entireties. In that kind of tenancy there is still a right of survivorship. The husband has a right to the possession and use of the property during the marriage.

Estates in entirety.

Dower.

977. After the husband's death the wife has an estate for her life, called dower, in one third of all the estates of inheritance of which her husband has been seized in possession, or in expectancy after an estate less than freehold, at any time during the coverture. The alienation of the estate by the husband does not destroy the wife's right, which during his life is an inchoate right, not a mere possibility,[3] so that in a conveyance of an estate of inheritance in land by a married man it is necessary and customary for the wife also to be a party to the deed to release her inchoate right of dower. If that is not done, she may claim her dower after her

[3] See § 273, 274.

husband's death against the purchaser. By the modern law a wife has dower in equitable estates also. The above is dower at common law, called also *dos rationabilis*. By special custom in some parts of England the wife was endowed of more or less than one third of the land, or only in such land as her husband held at the time of his death, which last kind of dower is technically known as free-bench. Free-bench is found in some of the United States. There were formerly also other kinds of dower, now obsolete, the most important of which was dower *ad ostium ecclesiae;* where on the occasion of a marriage the husband specified exactly what lands the wife was to have as her dower land, so that after his death she could enter upon them at once without any assignment of dower.

Dower by special custom.

Free-bench.

Dower at the church door.

The wife has a right to remain in her husband's principal residence for forty days after his death, which are called her quarantine. The heir, or his guardian if he is an infant, must assign to the widow her dower, that is, designate the particular property which she is to have, within the forty days. Her dower in land must be set out by metes and bounds, but in indivisible things she must be endowed specially, as of the third presentation to a church, the third part of the profits of an office, the third sheaf of tithe wheat, and the like. A wife may be barred of her dower by eloping from her husband, by divorce, by being under any disability to hold land, by having joined in any deed or convoyance of the land during the coverture, and also in England by withholding the title deeds of the estate from the heir until she restores them, and at common law by her husband's forfeiture of the land by crime. A husband can not by disposing of his land by will deprive his wife of her dower. But if he makes a provision for her in his will which is expressed to be in lieu of dower, she must elect between the two, and give up her dower if she accepts the testamentary gift; but unless the gift is expressed to be in lieu of dower, she may have both.

The widow's quarantine.

Assignment of dower.

How dower is barred.

Provisions by will in lieu of dower

978. The most common method of barring dower, however, is by jointure or marriage settlement. A jointure originally meant an estate given to the use of the husband and wife jointly, which in case the husband died first would come to the wife by survivorship. At present it means property conveyed,

Jointure.

generally in contemplation of an intended marriage, by an instrument to which the wife is a party, to the use of the wife for her own life or in fee, to take effect immediately upon her husband's death, and expressly declared to be in lieu of dower. By becoming a party to the agreement she renounces her dower. If the jointure is made after the marriage, the wife, not then having power to bind herself by agreement, may elect after her husband's death, when she is again a *feme* sole, between the jointure and her dower, but can not have both.

Marriage settlements.

A marriage settlement is a family arrangement, made generally by deed in contemplation of an intended marriage or sometimes after marriage, for the disposal of the whole or some part of the family property.[4] Such arrangements are nearly universal in England among people of property, but are very rare in the United States.

he property settled.

The property settled may be real or personal, and may belong to the husband or wife or to some parent, relative or friend who makes the settlement for the benefit of the married couple, or to more than one person. For example a father on the marriage of his son or an uncle on that of his nephew may settle a portion of his property on the young man; some one of the bride's family may do the same on her behalf; and if the intended husband and wife already have property, that may be brought into the settlement.

orm of the settlement.

The settlement may be in the form of a present conveyance of property or of covenants to convey property in the future, or both.

Parties.

The parties to the settlement are usually the husband, the wife, the owners of the property to be settled and persons selected to act as trustees.

Considera-tion.

The marriage forms a valuable consideration for the settlement, if it is an ante-nuptial settlement o a post-nuptial one made in pursuance of an ante-nuptial contract to make it; but in other cases a post-nuptial settlement is a mere gift, unless some other consideration is furnished.

bject of the settlement.

The object of the settlement is to provide for the use and enjoyment of the property by the husband or wife during and after the coverture, for its devolution at their death and for the children of the marriage. This is usually accomplished by a series of uses and

[4] The word settlement is often used of any disposition of property for a person's benefit, especially a family arrangement, though made without any reference to marriage.

trusts, often very complicated, these being more flexible and convenient than limitations of common law estates. Some provision for the wife in lieu of dower in case of her surviving her husband is almost always inserted, which, whether amounting to a technical jointure or not, is often called by that name and will bar her dower; or in a post-nuptial settlement at least put her to her election. A strict settlement is where the estate, use or trust is limited to the husband or wife for life, remainder to the survivor of them for life, with a remainder over to the issue of the marriage, which when the property settled is real property, is to the oldest son, if there is any, in fee tail, with an ultimate remainder in fee simple to the issue generally or to the settler himself. Strict settlement.

979. When a married woman is seized of real property in fee in possession, or in expectancy after an estate less than freehold, and has a child born alive during the continuance of the coverture which if it lives will be heir to the property, her husband, if he outlives her, whether the child be then living or not, has an estate for his life in the whole of the property, called an estate by curtesy. This exists at present both in legal and equitable real property. Before the birth of a child the husband's expectation of having such an estate is a mere possibility. When a child is born, his right is known as an estate by curtesy initiate, which is an inchoate right, and it becomes consummate or complete on the wife's death. Curtesy.

980. At common law the husband had the use of all his wife's real property during her life, but did not become the owner of it. All her personal property in possession, both what he had at the time of the marriage and what came to her afterwards, belonged to him absolutely; so that a married woman was incapable of holding such property. Her choses in action became his, if he reduced them into possession during her life, *e.g.* if he received payment of a debt due to her, the money was his; and he might bring an action for that purpose. But if he did not reduce them into possession, they went on the wife's death to her personal representative.[5] The general rules as to the wife's The wife's real property. Her personal property. Her *choses* in action.

[5] This was usually the husband, who administered for his own benefit. See § 668.

The wife's separate estate.

equitable property were the same. But probably as early as the reign of Elizabeth the practice began of giving property in trust for a married woman expressly to her sole and separate use free from the control of her husband. When there was an express trust of that sort, the courts of equity did not follow the general rule, but respected and carried into effect the intention of the donor, and secured the property to the wife, not permitting the husband to meddle with it. This was called her separate estate or separate property in equity; and unless the terms of the trust prohibited it, she was allowed to sell, convey and deal with it at her pleasure as owner. A great deal of property was settled in this way for married women in order to evade the rules of the common law, until recent changes in the law made it unnecessary. At present by statute the rights of husbands in their wives' property have been greatly curtailed, and in many places entirely taken away, except the husband's curtesy, leaving a married woman as completely mistress of her own property as if she were single. But the husband's duty to support his wife remains.

The present rights of a husband in his wife's property.

The husband's rights against third persons.

981. As to third persons, the husband and wife have certain rights in each other, and the husband has, or had, certain responsibilities. A husband has a right to his wife's *consortium, i.e.* her society or companionship, so that it is a violation of his right to persuade, compel or assist her to leave him or refuse to live with him. He has also rights in her services and her affection, which are violated by inducing or coercing her to refuse to render him the services due from her or by alienating her affections from him. In addition he has rights in her personal security, probably including her reputation, so far as that is necessary to enable her to give him her *consortium* or render her services, but to no greater extent; so that these rights are often said not to be absolute rights but to be relative to her *consortium* and services. Thus if a person commits a battery upon a married woman or abducts and imprisons her, that is a wrong against her, however trivial the injury may be; but it is not a wrong against her husband unless he is thereby deprived of her *consortium* or services, in which case it is also a wrong against him. In actions at common law for such wrongs it was necessary for the husband, after stating

The wife's *consortium.*

Her services and affections.

Her personal security.

Relative rights.

in his pleading the injury done to the wife, to add *per quod servitium*, or *consortium, amisit* or equivalent words.[6]

Loss of services, however, does not imply that the wife ever did render, or but for the wrong would have rendered, any actual services to her husband. It means simply that she has been to some extent disabled or incapacitated for rendering them had he called for them. But a husband has an absolute right in his wife's chastity, so that it is a tort against him for another man to have carnal knowledge of her with or without her consent, irrespective of whether it causes any actual damage or loss of services to him.

Loss of services.

The wife's chastity.

A wife has similar rights in her husband's affection, and perhaps in his *consortium* but not in his services, personal security or chastity.

The wife's rights in her husband.

982. The duties corresponding to the husband's rights in his wife's personal security are the same which correspond to the wife's own right. As to the other rights of husband's and wives, the duty which other persons owe to them is not to do any act with the intention of thereby causing a violation of the right. Intention here means culpable intention, *i.e.* includes a knowledge of the existence of the right violated and of the facts that make the act wrongful. It is wrongful to entice a wife to leave her husband, or to harbor her after she has left him with the intention of assisting her to remain away from him, provided the party doing the act had notice that she was a married woman; but it would not be wrongful to hire a woman as a domestic servant, thus taking her temporarily from her husband, if the hirer did not know that she was married or believed in good faith that her husband had consented to the hiring. Also one may harbor or assist a runaway wife so far as humanity requires, *e.g.* give her shelter from a storm or feed her if she is starving, even though the incidental effect is to prevent her from being forced by want to return to her husband, if that is not the purpose for which the act is done; and if she rightfully leaves her husband, for instance if she is driven away from him by his cruelty, any one may harbor or aid her from motives of humanity. Such motives and the absence of a wrong intention are *prima facie* presumed in the wife's relations who give her shelter or aid, or even advise her to leave her husband when he illtreats her.

Duties of third persons.

Intention.

Assistance from charity.

Presumptions in favor of the wife's family.

[6] See § 897.

Responsibility of the husband for his wife.

983. At common law a husband was responsible for all debts and claims for damages existing against his wife at the time of the marriage and for all torts committed by her after marriage. The ground of this liability was that he had in his hands all of her property, which was the only source from which her debts could be paid or compensation for her wrongs got. But in most places by statute he is now relieved from those responsibilities. In all actions brought by the wife he must formerly have joined as a plaintiff, and the damages recovered belonged to him; and in actions against him for her debt or wrong she had to be made a party, though the judgment could be enforced against him only. This has generally been changed by statute, and a married woman now sues and is sued alone as if she were a *feme sole*. Between husband and wife no civil action lies, except a matrimonial action.

Actions by and against husband and wife.

The wife's crimes.

A husband is not responsible for his wife's crimes, unless he actually commands or connives at them. She is excused for any crime except treason or murder committed by her under her husband's coercion. If she commits a crime in his presence, she is at least *prima facie* presumed to have been coerced to it by him, and at common law in cases of felony this presumption was conclusive.[7]

Agreements by married women.

984. At common law a married woman could not bind herself by any contract or agreement, or alienate without her husband's consent any of her property, or make a will. Such acts by her were not merely voidable, but absolutely void. But a transfer of property could be made to her, and a unilateral contract in her favor was valid unless the consideration was some transfer of her property or agreement on her part which she had no power to make, *e.g.* a bond given to a married woman was generally good. A married woman, however, could be agent for another person, even for her husband, and in that capacity could make agreements binding upon her principal. She could also be a guardian, executor, administrator or trustee. At present by statute in most places the old disabilities have been

A married woman could be an agent etc.

The modern law.

[7] Probably out of mercy to the wife, who if she were convicted would not have benefit of clergy (see § 1234), but would be hanged for the first offence.

removed, and a married woman can contract freely; except that no binding contract can be made directly between a husband and his wife. But a husband may make a contract with a third person who acts as trustee for the wife, so that the wife will have the benefit of the contract in equity, or a wife may contract with a trustee for her husband.

Contracts between husband and wife.

Modern statutes.

985. The common law rules above mentioned remained in force till well into the last century. And the present law, which restores to a wife all her property rights, removes her disabilities and relieves the husband of responsibility for her debts and wrongs, is very recent. Between the two intervened a period of confusion, during which the old law was being abolished piecemeal by statutes which exhibit no uniformity or system.

CHAPTER LXIII.

PARENT AND CHILD: INFANTS.

986. Here fall to be considered the relations of the parties between themselves, their relations to outsiders, and the disabilities of infants.

Duties of a child.

A child ought to remain in his father's custody, to obey his father's lawful and reasonable commands, and to render him reasonable services. The father has no action against his child to compel the performance of these duties, but he may use necessary and reasonable force for that purpose, and may punish the child moderably and reasonably for disobedience or misconduct.

The child's wages.

The child's wages, if he earns any, belong to the father, to whom only they are properly payable. But the father may permit the child to receive and dispose of his own wages,

Emancipation.

and may even emancipate him entirely from his service, or, as the common phrase is, give him his time.

The father's duties.

A father must support his child and provide him with necessaries,[1] which in the case of a child include education. If

Necessaries.

the father does not do so, the child has no remedy against him, but may purchase necessaries for himself and bind himself by a contract to pay for them. A child was never at common

Support of parents and relatives.

law under any obligation to support his parents, even if they were indigent and helpless. But in modern times provision has been made by statute in many places, that if any person is poor and unable to support himself and likely to become a public charge, his near relatives, if he has any of sufficient ability, may be compelled to contribute toward his support.

The custody of the child.

987. A father has a right against third persons to the custody of his child, and may have a writ of *habeas corpus* to regain his custody against any one who detains the child from him. But in case of gross abuse or neglect of the child by the father, the child may now be taken from him and committed to the custody of some other person by an order of court, and the father compelled to make provision for its support.

[1] See § 975.

988. Whatever other rights a father has in his child, he has in the capacity of master, not of father as such. It therefore becomes necessary to inquire in what cases a child is his father's servant. He is always so when he is not actually the servant of some one else, even though in fact he never renders any services. Thus a girl sent away to a boarding school at a distance from her home is still in the service of her father. If the child is actually the servant of another person and the father has not the right to put an end to the service at his pleasure, as where a boy or girl is bound out as an apprentice for a term of years, the father has not the rights of a master. When the service is terminable at the father's pleasure, so that he can take back the child from his master at any time, the authorities conflict as to whether the child should be considered as his father's servant, the older decisions generally taking the negative view, but the later ones, especially in the United States, including to the affirmative. A father who sues for an injury to his child always sues as for an injury to his servant, *per quod servitium amisit.* Here, as in the case of a wife, loss of services means not necessarily an actual loss, but that the child is incapacitated for rendering services should the father require them. The most important case is the seduction of girls. A father has no absolute right in his daughter's chastity such as a husband has in his wife's, but only a right relative to her services; and to maintain an action against the seducer he must show that the girl was his servant and that some loss of services occurred. Mere unchastity on the girl's part does not necessarily involve any loss of services to her father. If pregnancy or venereal disease results, that does; though there may be a loss of services without these. But when a father suing for the debauching of his daughter has proved a loss of services however small, that will suffice to sustain the action, and then the sum recoverable as damages is not limited to the pecuniary value of the services, but the jury may give very large damages.

The father as master.

When the child is the father's servant.

When the child is another's servant.

Loss of services.

Seduction of girls.

No right in a daughter's chastity.

Damage to father.

Measure of damages.

At common law there were no special duties or rights between a child and its mother, and she had no rights in the child as against third persons. This is still the rule so long as the father lives. But at present, in the United States at least,

Rights of a mother.

the mother after the father's death is generally held to have the same rights and duties as the father would have, so far as consistent with the rights of a guardian, if one has been appointed. A girl for instance whose father is dead may be her mother's servant, so that the mother may have an action for her seduction.

Adoption.

989. Adoption was unknown to the common law. In modern times provision has been made for it in most places by statute, but it is uncommon. It is usually effected by a decree of a court. Generally an adopted child comes into the same legal position as a child by birth, but sometimes he retains the right to take property by inheritance or distribution *ab intestato* from his former family, and sometimes can not do so from his new family. The law on these points is different in different places.

Standing *in loco parentis.*

Informal adoptions, however, arrangements by which a person takes charge of a child which is not his own and stands to it *in loco parentis*, as it is said, are not infrequent. Such a relation does not affect in any way the child's succession to property; but while it lasts the person standing *in loco parentis* has substantially the same rights against and in the child as a father. Either party may put an end to the relation at any time. A stepfather is not necessarily *in loco parentis* to his stepchildren, even though they live with him, and is not bound to support them.

Bastards.

990. A bastard being *filius nullius*, there are at common law no special rights or duties between him and his parents, nor have they any rights in him. But in the United States,

Rights of the mother.

as one of the judges said, it has been discovered in modern times that a bastard is the son of his mother, and she now has generally the same rights and duties as the father of a legitimate child has. In some states he may even succeed to a portion of her property after her death, but not in most places. Of course if the father or mother of a bastard is actually standing *in loco parentis* to him, the ordinary rights and duties incident to that situation will arise. Also by virtue of statutes the father, or, as

Support by the putative father.

he is called, the putative father, of a bastard child may be compelled to support it by an order of court made in what are called bastardy proceedings, which can be instituted against him

by the mother of the child or, if there is danger of the child's becoming a public charge, by the authorities having the superintendence of the poor.

Majority.

991. A person attains his majority or comes of age at twenty one. From that time the special duties and rights above mentioned, which pertain to the relation of parent and child, cease to exist, and he become an independent member of society, a normal person. A person under the age of twenty one is called a minor or infant. But a boy arrives at what are called years of discretion at fourteen and a girl at twelve.

Infants.

Age of discretion.

Infants' property.

992. An infant has the same capacity to acquire and hold property as a person of full age, but the control and management of his property is in the hands of his guardian.

Infants' agreements.

993. All contracts and other agreements made by an infant, except in the case already mentioned of contracts for necessaries, are voidable. The infant may avoid them at any time before he comes of age or within a reasonable time thereafter, but if he does not avoid them within that time they are valid and binding. But by the English infants' relief act of 1874 most contracts of infants are made absolutely void and incapable of ratification. The rule that a person who rescinds a voidable agreement must restore what he has received under it does not apply to an infant, unless he has the thing in his possession and is able to restore it. He may avoid his agreement whether he can restore or not. Thus if an infant buys goods and consumes them, he may nevertheless refuse to pay for them. Also an action can not be maintained against an infant for a tort or on a non-contractual obligation, if a recovery against him would amount practically to the enforcement of his contract. Thus in the case just mentioned of an infant's buying goods and using them up, he can not be sued for the price as for a debt arising out of the reception of a benefit or in tort for the conversion of the goods. It has even been held that if an infant induces a person to sell him goods by a fraudulent misrepresentation that he is of full age, and then refuses to pay for them, no action will lie against him for the fraud. An infant may however be an agent for another person, and in that capacity make agreements for his principal, and may be an executor or trustee.

Recission by infants.

Torts founded on contracts.

An infant may be agent etc.

Infant's will. An infant can not make a will, though probably in former times an infant who had arrived at years of discretion could do so.

injury. This is called vicarious negligence. But in many of the United States the doctrine of vicarious negligence is rejected.

Infant husbands and parents. If the infant is a husband, wife or parent, he or she has the same rights and duties in that capacity as a person of full age.

Infants' torts. **994.** An infant is responsible for torts committed by him, and his father or guardian is not responsible for them. But a child not old enough to distinguish between right and wrong or to understand the consequence of his conduct can not be guilty of any tort. In regard to contributory negligence, which will debar an infant from a remedy for an injury done to him by the negligence of another, an infant is not required, as normal persons are, to act up to the standard of a reasonable and prudent man, but only to use such care as is reasonably to be expected from a person of his age. Very young children are legally incapable of negligence. The age at which they become capable of it, or, as is said, become *sui juris*, is not precisely fixed, but is probably somewhere from three to five years. But in cases of contributory negligence, the negligence of a person in charge of a young child is imputed to the child. Thus if a woman with a baby in her arms negligently attempts to cross a railroad track in front of an approaching train, and is run over and the child is hurt, the child can not have any action for the

Contributory and negligence of infants.

Persons *non sui juris*.

Vicarious negligence.

Suits by and against infants. **995.** An infant may sue or be sued for a civil injury. But he can not commence a suit in his own name or appoint an attorney to represent him. He must sue by his next friend or *prochein ami*, who is any person of full age that consents to act as such. The next friend, and not the infant himself, is responsible for the costs of the suit. If an infant is sued, the court will not permit the action to go on until a guardian, called a guardian *ad litem*, has been appointed to protect the infant's interests. Such a guardian will be appointed by the court before which the action is pending at the request of the infant himself, the plaintiff, or any interested party. The guardian *ad litem*, not being like a next friend a volunteer but serving persuant to an order of the court, is not responsible for costs. In some of

the United States a guardian *ad litem* is also appointed for an infant plaintiff on the application of the infant himself before the commencement of the action.

Infants' crimes.

996. An infant is capable of committing crimes, and is punishable for his crimes like a person of full age, provided he has intelligence enough to understand the nature of his act and to have any bad state of mind that enters as an element into the crime. Nor is coercion by his parent or guardian a legal excuse, though it may mitigate the penalty. At common law an infant of the age of fourteen years might be punished by death, but under the age of seven he could not. In the period between those two ages he was *prima facie* presumed incapable of committing a capital crime, but if he was proved to be in fact *doli capax*, he might be punished capitally. At present juvenile offenders are not generally confined in the common prisons, but are committed to reformatory institutions in the hope that discipline and instruction may wean them from evil courses.

Juvenile offenders.

CHAPTER LXIV.

GUARDIAN AND WARD.

Guardians

997. A guardian is a person appointed to take charge of an infant, a lunatic or other helpless person or of his property or both. The person under guardianship is a ward.

Guardian by nature and for nurture.

A father is said to be guardian by nature of his child who is also his heir apparent, and guardian for nurture of his children generally, and if he is dead the mother may be. These guardianships are only of the child's person, not of his property.

Guardian in socage.

Guardianship in socage, also called guardianship by the common law, obtains, as has been already explained, when the ward has been left heir to an estate in socage. This is a guardianship of both the person and the estate of the infant heir. Such a guardian seems to have something more than a mere authority, some sort of a temporary right in the estate, so that he can bring actions for injuries to the land, make leases of it and do various other acts concerning it in his own name and not merely in the name of his ward. The three kinds of guardianships above named continue only till the ward reaches the age of fourteen years,

Choice of guardian by infant.

after which he may choose his own guardian. At common law there seems to have been no particular form required in the appointment by an infant of his own guardian, it might be by deed or by parol, and did not require the approval of any

Modern law.

court. These kinds of guardianship are now of little importance. While the father lives no other guardian of the person can be appointed, except when the child has been taken from the father by a decree of a court or abandoned by him, and guardianship in socage is nearly extinct. When a guardian is necessary, one is usually appointed as hereafter mentioned.

Statutory or testamentary guardian.

However, by various statutes a father, and in most places a mother if the father is dead, may appoint a guardian for a child by deed or will, which guardianship may be made to last until the child comes of age or for a shorter time. Such guar-

dians are called guardians by statute, or if appointed by will, as is most usual, testamentary guardians, and have charge and control of the ward's person and all of his property, both real and personal. Such an appointment suspends the child's right to choose his own guardian. In England there are also guardians by virtue of certain local customs, such as of an infant tenant of a manor by the custom of the manor; but there are no such guardians in the United States.

Guardian by custom.

998. In both countries certain courts have power to appoint guardians for infants, both of their persons and their property. In the United States a guardian so appointed is known as a general guardian, and is usually appointed by a court of probate. In England if a suit regarding the infant's property is pending in the court of Chancery, the court will appoint a guardian of his person, but not of his property, that being under the charge of the court. The infant is then called a ward in Chancery. Even when no suit is pending, that court may appoint a guardian. In such a case the Chancellor acts as the representative of the King, who is *parens patriae*, rather than in his capacity as an equity judge. And if an infant is made sole executor under a will or is the next of kin to whom administration ought to be granted, the court of probate will appoint a person to administer in his place, who is a sort of guardian.

Appointment of guardians by courts.

General guardian.

Appointment by the court of Chancery.

Guardian for administration.

A guardian may also be appointed for a special purpose, to do or consent to some act on behalf of the infant which is proper to be done but which the infant himself has not capacity to do or consent to.

Guardian for a special purpose.

999. A ward owes the same submission and obedience to his guardian as a child to his father, and the guardian has the same right to compel obedience and good behavior and to punish the ward as a father has. The guardian's duty however to support and educate the ward is only to do so so far as he can out of the ward's own property; he is not obliged to do anything for the ward at his own cost. A guardian is a trustee, and has the ordinary duties of trustees. At the end of his guardianship he must render an account to the ward of all the property which he has received of his and of his doings in regard to it, and must make good out of his own pocket any

Powers and duties of a guardian.

Accounts.

loss or waste or improper expenditure of the ward's property due to his wilful default or negligence. In most places he is now also obliged to render provisional accounts yearly. If he has any doubt as to what he ought to do, he may apply to the court having jurisdiction over his accounts, in England a court of equity, in the United States sometimes a court of equity and sometimes the probate court, which has for such purposes the powers of a court of equity, for advice; and if the application is warranted by the existence of a reasonable doubt, he will be permitted to charge the expense of making it against the ward's property and credit himself with it in his account.

Application to the court for advice.

Custody of the ward.

A guardian has the same right to the custody of his ward that a father has to his child, and if he is wrongfully deprived of his custody may recover it by a writ of *habeas corpus*. But the ward is not his servant, and owes him no services.

Services.

CHAPTER LXV.

MASTER AND SERVANT.

Slavery.

1000. Slavery formerly existed in both England and the United States, but is now abolished. In England both slavery and villeinage gradually became extinct. It seems not to have been judicially determined that slavery was unlawful in England till 1772, and it continued to exist for some time longer in the British colonies. In the United States it was finally abolished by the thirteenth amendment to the national constitution after the civil war, having never existed in the newer states of the north and having been long before prohibited in the older ones. At present if a slave comes or is brought by his master from any country where slavery exists into the United States or Great Britain or any English dependency, he becomes free at once While slavery existed the master's right in his slave was an ordinary property right, the slave being for that purpose a chattel, though for the purposes of the criminal law he was regarded as a person, so that he could be punished for his crimes and it was a crime to kill or injure him

Statute of laborers.

Statute of Elizabeth.

1001. In England by various old statutes, the most famous of which were the statute of laborers, passed in 1349 when the break up of the feudal system and the ravages of the great pestilence known as the black death had revolutionized the labor market and the dawn of the modern free industrial system was beginning to appear, and the statute of 5 Elizabeth concerning laborers, various provisions were made for compelling the lower orders of people to work and for having the wages of servants fixed by public authority, and persons were forbidden to work at certain trades unless they had served a regular apprenticeship. But those have been repealed, and all persons are now legally free to engage in whatever occupations they please, except in a few professions like law and medicine for which a special preparation is required, and to make what contracts they can with their employers. But by various statutes in both England and the

Right to work at trades.

Employment of women and children. Factory acts. Eight hour laws.

United States the employment of women and children in certain trades and the hours of their labor are regulated, and various sanitary rules prescribed for factories and workshops. Also by statute the hours of daily labor for many classes of servants are fixed at ten or even eight, unless the parties otherwise agree, instead of the old customary hours, which were usually longer. These statutory regulations, ancient and modern, can not however be discussed in detail here.

Apprentices.

1002. An apprentice is a servant who is bound for a term of years by indenture to a master to serve the master and to be supported and instructed by him; but the name is at present often applied to any servant who enters the service of a master in order to learn a trade without any indenture or any contract for a fixed time. An apprentice is generally an infant who is bound out to a master by his father or guardian, or in case of a pauper child by the officers who have charge of the poor, to be taught a trade. The infant himself is generally a party to the deed, and this contract is binding upon him, contrary to the general rule as to infants' contracts. He may or may not be entitled to wages; often indeed the master is paid a premium for receiving him. The master of an infant apprentice stands *in loco parentis* to him, and has substantially the same rights and duties as a father, besides the special duty to instruct him in his trade or art, or, as the old books say, his mystery. An apprentice who refuses to work, misbehaves or run away from his master may be punished both by his master and by the public authorities as for a crime, in which respect apprentices, together with seamen, differ from other servants, the general rule being that a master may not punish his servant and that the breach of a contract of service, like that of any other contract, is a mere civil injury and not a crime. The apprenticeship may be terminated and the apprentice discharged by the consent of all the parties, or by the order of a court on the application of any party for a sufficient cause.

Menial servants.

Menial or domestic servants are so called from generally living in the master's house, *intra moenia*. At common law if such a servant was hired and no term of service was fixed, the hiring was construed to be for one year. But now it is at will, and

the master may discharge his servant or the servant leave his master at any time, subject to any custom that may exist as to giving notice. The usual custom is that either party must give one month's notice before terminating the relation, instead of which, however the master, if he chooses, may discharge the servant without notice on paying him one month's wages.

Laborers are hired by the day, week or month, and generally do not live in the master's family. Laborers.

All persons who are employed to render services under the direction and control of the employer are called in law in a certain loose sense servants, such as clerks, salesmen, artizans, superintendents, hired teachers, lawyers or the officers of corporations. But an independent contractor, who undertakes to do a job of work for an employer but is not under the latter's orders or direction, for instance a tailor who in his own shop makes a suit of clothes for a customer, or a builder who takes a contract to put up a building and employs his own workmen, is not a servant. Other servants. Contractors.

1003. A distinction also exists between a servant and an agent, though it is exceedingly hard to define. The relation of a servant to his master, if it was not actually derived from that of a slave, has been at least to some extent assimilated to that. The free servant has put himself by his own act as to a part of his personality and conduct into a position similar to that in which a slave stood as to the whole of his. His agreement with his master is probably, like a marriage, something more than a contract in the strict sense. It is a juristic act by which he assumes a status, and the obligations between him and his master do not arise directly out of the agreement, but, like those between a husband and wife, pertain to the status created by the agreement, so that they are really non-contractual obligations. Hence the servant's personality is to a certain extent subordinated to that of his master. And although in modern times the mutual duties of masters and servants are regarded as based upon contract, and the remedy which either has against the other for a breach of them is an action on the contract, yet some remnants of the old theory remain in the rule already mentioned that a servant does not have possession of his master's goods in his Servants and agents.

custody, he being, as it were, merely the hand by which the master holds them, and in the principle that a master has rights *in rem* in his servant against third persons as a husband has in his wife. But agency is not a status; it is purely a relation created by agreement, a bailment. An agent is simply a person who is employed to do certain things, and his relations with his principal extend no further than those very matters. He is the possessor of the goods of his principal which he has in his hands, and is not the subject of any right *in rem* pertaining to the principal.

Law of master and servant.

1004. As in the case of the other domestic relations, the law of master and servant concerns the rights and duties which exist between the parties and also those between them and outsiders.

Mutual rights and duties of the parties.

The former are determined by the contract between the parties. In the absence of any contrary agreement the law implies the following. The servant is bound to obey his master's lawful and reasonable commands, to conduct himself civilly and respectfully towards him, to render his agreed services and use due care to render them properly. The master may discharge the servant without warning and before the expiration of the term for which he was hired for any serious misconduct, including unchastity in the case of a female domestic servant, or for habitual or wilful and persistant disobedience or neglect of duty, but not for every trifling offence. The servant on the other hand may lawfully quit his master without notice and before the end of his period of service, if the master seriously illtreats him or does not pay him his wages as they come due. A master has no right to keep back any part of the servant's wages as security for his good behavior, or to compel the servant to pay for accidental breakages and injuries to the master's property not due to the servant's fault. If a servant is temporarily disabled from work by sickness or accident, he is generally entitled to his wages during the disability. If a servant is lawfully discharged for his own fault or unlawfuliy leaves his master's service in the interval between two times for the payment of wages, *e.g.* if wages are payable monthly and he leaves in the middle of a month, he forfeits the wages for the whole of the current period, but not such as are already due but unpaid.

Discharge of servant.

Servant's right to quit.

Wages.

Servant's remedies for unlawful discharge.

If the servant is unlawfully discharged before his agreed time, he has his choice of three remedies. (1) He may regard the contract between him and his master as rescinded by mutual consent, and sue on a *quantum meruit* for the reasonable value of his services, the action being based on an obligation of the kind mentioned in § 758 (2) He may sue at once on the contract for unliquidated damages for its breach. In this case, however, it will usually be difficult or impossible for him to prove that he has suffered any actual damage, and he may therefore recover only nominal damages. (3) He may wait till the agreed time of his service has expired, and then bring a suit on the contract for damages, without being obliged to show that he has made any tender of his services to his master since the discharge. In such a suit the measure of damages will be the entire amount of the wages which he would have received had he continued in the service, less what he has received by working elsewhere or would have received had he used diligence to get another place; for a servant in such a case has no right to sit down in idleness and then make his former master pay for his lost time, but must use reasonable endeavors to find work. However, what the servant recovers in such an action, though equal in amount to his wages, is not recoverable as wages *eo nomine*, *i.e.* as a debt, but as damages for a breach of contract. There can be no debt for wages unless the services have been actually rendered.

Duties of master as to servant's safety.

1005. One of the most important instances of the duty of an inviter described in § 696 is found in the law of master and servant. A master invites his servant to put himself into the place and environment in which his work is to be done, and therefore owes a duty to the servant to use due care to guard him against any dangers incident thereto. Many actions have been maintained against masters for negligent disregard of their servants' safety. But if the servant knows of the danger, he generally takes the risk of it upon himself, and the master can not be held responsible for any injury that happens to him from it. And the servant is presumed to know of such dangers as are obvious, *e.g.* from the construction, operation or defective condition of machinery at which the servant is set to work and which he

Servant's taking risk.

ought to notice, or as are necessarily incident to that kind of work. Thus a person employed to work in a powder mill takes the risk of injury from an accidental explosion. But in the case of servants of tender years, they may not have sufficient intelligence to protect themselves against even obvious dangers, so that it may be the master's duty to give them special instructions or to take special precautions for their safety; *e.g.* a master may be guilty of negligence in setting a young child to work among dangerous machinery without warning or instruction, even though the danger is open and apparent.

Servants of tender years.

Master's responsibility to third persons

1006. If the master appoints his servant his agent to make contracts or do other juristic acts for him, the ordinary rules of agency apply.

Servant's torts.

The master is responsible for torts committed by the servant against third persons in the course of the master's business, but not for the servant's torts when he is acting for himself and not for his master. A servant may be acting for his master and in the course of the master's business, although he is disobeying the master's orders. The conductor of a railroad train, whose duty it is to expel a passenger who refuses to pay his fare, acts for the railroad company in so doing. If he uses unnecessary violence, and so injures the passenger, the company is responsible for his act, even though it had given him the strictest orders not to use excessive force. But if after the passenger has left the train, the conductor gets off and commits an assault upon him, that is not done in the course of the company's business. So if a master sets his servant to clearing the snow from the roof of his house, and orders him to throw it into the yard, but the servant to save himself trouble negligently throws it into the street, where it falls upon and injures a passer by, the master is liable. But he would not be liable if the servant should wilfully and maliciously cast snow upon a person in the street. It is sometimes said that a master is not responsible for the wilful and malicious torts of his servant. But that is not correct. The true test is whether the act is done in the course of the master's business. Wilful and malicious torts usually are not, but they may be. If, for instance, the hired manager of a store is directed by the proprietor to prosecute persons who

Wilful and malicious torts by a servant.

steal goods from the store, he may make the proprietor responsible for a groundless and malicious prosecution instituted by him. The master has authorized him to decide in what cases to prosecute, so that his decision is the master's decision and his prosecution the master's prosecution, even though the master did not intend that he should prosecute in such a case.

Master not responsible for torts of fellow servants.

1007. To the above principle there is one very important exception. A master is not responsible to a servant for an injury from a fellow servant Thus if by the negligence of the engineer of a steamer the boiler explodes and a passenger and one of the seaman are injured, the passenger may sue the shipowners for damages, but the seaman can not; he and the engineer are fellow servants. This is put upon the ground of an implied contract between the master and the servant exempting the master from liability; but that is in most cases a mere fiction. But in England and in some of the United States statutes known as employers' liability acts have been recently enacted that to some extent make the master liable.

Employers' liability acts.

Who are fellow servants.

Fellow servants are all persons employed by the same master in the same business, even though they are in different departments of the business and although one is subordinate to and under the orders of the other. Thus if a railroad company has a telegragh line which it uses for regulating the running of its trains, a telegraph operator and the conductor of a train are fellow servants. So are the master of a ship and one of the crew But if a man was at the same time a farmer and a merchant, the two business being entirely separate, a farm laborer would not be a fellow servant with a clerk in the master's mercantile office. So if a person who was building a house lets out the carpenter work to one contractor and the mason work to another, the workmen employed by the two contractors would not be fellow servants.

Delegation by master of the performance of his duties.

When the master owes to his servant a duty as in § 1005 to make the conditions under which he works safe, and commits the doing of the necessary acts to another servant, who neglects to do them, the principle in § 409 applies, that a person who is under a duty to do acts can not get rid of his responsibility by delegating the performance to another, and the master will be

responsible to the former servant for an injury to him from the negligent omission of the latter to do the necessary acts; it is the master's own omission. The duty of the master to his servant also includes a duty to use due care to employ only careful and competent servants, and to make and enforce needful rules for the safe management of his business; so that if he negligently employs or keeps in his employment an improper person, and by the latter's fault a fellow servant is injured, the master may be responsible for the injury. When the servant to whom the master entrusts the duty of taking proper precautions for the safety of other servants is one of high rank and large powers, such as the superintendent of a railroad or the manager of a factory, he is often spoken of as a vice-principal. The distinction between the case where the duty is thus owed directly by the master to the servant, so that the master is responsible to the servant if the duty is not performed, even though the direct cause of the non-performance is the neglect of a fellow servant, and the ordinary case of an injury to one servant from the negligence of another, for which the master is not liable, is perfectly clear in theory, but has been found exceedingly hard to apply in practice, and the decisions are difficult to harmonize. And decisions holding a master responsible for the neglect of a vice-principal have been sometimes misunderstood and taken to mean that a master is always responsible to an inferior servant for the negligence of a fellow servant placed over him as a superior; which is incorrect.

Vice-principal.

Liability of servant for his own wrongs.

1008. A servant, like any one else, is liable for his own wrongs. If a servant driving through a street upon his master's errand negligently runs over some one, if in expelling a person from his master's premises by his master's orders he uses unnecessary force or if he takes possession of another person's chattel by his master's directions when his master has no right of possession, the fact that he is a servant makes no difference and his master's order does not protect him. Either he or the master, or both, may be sued for the wrong. But when the servant's omission is merely a breach of a duty which his master, not himself, owes to a third person, it is not a wrong on his part toward the third person. Thus if the master is bailee of a

Omission to perform duty resting on master.

chattel and puts his servant in charge of it, and it is lost or injured by the servants omission to take proper care of it, the master only is liable to the owner, not the servant. The servant is not bailee and owes no duties as such. The same is true if by the servant's negligence a thing in the master's possession becomes a nuisance. But if a servant by misconduct in his master's business involves the master in liability, he is answerable to the master.

Servant's liability to his master.

1009. A master's rights *in rem* in his servant are in his services and in his personal security so far as that is a condition of his ability to render services. He has a similar relative right in the chastity of his female servant. An action by a master for a personal injury to his servant or for debauching his female servant lies only when he has thereby lost the services of the servant, *per quod servitium amisit.* In the case of an ordinary servant this means an actual loss of actual services, and the master can recover only such damages as will compensate him for that loss; but when the servant is his child the rule is different, as has been explained.[1] The duties corresponding to these rights are the same as to a husband's rights in his wife.[2] Enticing a servant to leave his master may be a wrong of either of two quite different kinds. (1) If the servant has no right to leave, as where he is hired for a fixed time which has not expired or is bound to give notice before leaving, the master's right in the servant is violated, the duty corresponding to which is not intentionally to entice the servant away; it is not necessary to make the act wrongful that it be done maliciously, and even its being done from good motives will not excuse it, *e.g.* if the enticer desires to hire the servant himself or get him a better situation. (2) But if the servant has a right to leave, there is no violation of the master's rights in him; and the enticing is not wrongful, unless it is done with a malicious intent to injure the master, so as to be a breach of the duty in § 720, and not even then if the enticement simply consists in persuading the servant to quit his master and take service with the enticer, because in that case it will fall under the exception in § 722.

Rights of master against third persons.

Loss of services.

Duties corresponding to those rights.

Enticing away servants.

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[1] See § 988.

[2] See § 982.

The duty corresponds not to any special right of the master in the servant, but to the master's general right of pecuniary condition, so that the enticement is not a wrong unless pecuniary damage to the master results.

CHAPTER LXVI.

SUNDRY ABNORMAL PERSONS.

Idiots.

Lunatics.

1010. "An idiot, or natural fool, is one that hath had no understanding from his nativity." "A lunatic, or *non compos mentis*, is one who hath had understanding, but hath lost the use of his reason."[1] In England the King, as *parens patriae*, is the guardian of all idiots and lunatics, which function he exercises through the Chancellor. On a petition or information filed in Chancery, a writ *de idiota inquirendo* or *de lunatico inquirendo* may be issued from Chancery to try by jury whether the person is an idiot or lunatic. In the United States the state takes the place of the King, and acts through the courts of equity or of probate. The King by the old law had the custody of the lands of idiots and lunatics, in the former case taking the rents and profits of the land for his own use during the life of the idiot, subject to the duty of providing the idiot with necessaries, and in the latter case holding the rents and profits as a trustee, to be handed over to the lunatic should he ever come to his right mind or to his personal representatives after his death. The King might grant the custody of an idiot and the profits of his land to a private person, which led to great abuses.

Care of idiots and lunatics.

The old law as to their property.

Such was the old law, but the modern law is different.

Present nomenclature.

Whether a person was born deficient in intellect or became so afterwards is now of no importance. *Non compos mentis* or person of unsouned mind is a general name for a person so wanting in understanding as to be properly treated as an abnormal person, whether this amount to absolute idiocy, imbecility or extreme weakness of mind, or mental disorder, which latter is more properly called insanity or lunacy; though these terms are used somewhat confusedly, and the name insanity is often applied to all of these states, as will be done for convenience sake in this chapter. Every person is *prima facie* presumed to be of sound mind, except a person who is deaf, dumb and blind, as to whom the presumption seems to be the other way.

Presumption of sound mind.

[1] Black. Com. 302, 304.

Restraint of insane persons.

1011. The family of an insane person may place him under confinement for medical treatment or to prevent him from doing harm, and so may any person in case of pressing necessity; but unnecessary harshness is wrongful. And if a person is improperly confined as being insane, even though the person who confines him honestly believes him to be so, it is a false imprisonment, and he may be set free on a writ of *habeas corpus* and may have an action for the wrong. In order to prevent abuses, private mad-houses or asylums for the insane are by statute required to be licensed, and are subject to inspection and control by public officers. There are also in most places public asylums. No person can be committed to an asylum without medical certificates of the fact of his insanity.

Asylums.

Property of insane persons.

If an insane person has property, a judicial inquiry or inquest must be had, either by a writ *de lunatico inquirendo* or by some equivalent proceeding, to have him adjudged insane; and then the proper court will appoint a guardian or committee to take charge of his property and if necessary of his person, who has substantially the same powers and duties as the guardian of an infant. In most places a similar guardian or committee may be appointed for the property of a person who, though not insane, is a spendthrift and squanders his property, so that it appears likely that he or his family will become paupers and a charge upon the public.

Juristic acts of insane persons.

1012. If an insane person has lucid intervals, he may in one of those intervals marry or do any juristic act, except that if he is still under guardianship he can not dispose of his property. As to juristic acts done while the party is actually insane, a distinction is taken between mental weakness or disturbance which prevents him from understanding the nature or consequences of his acts, and so practically renders him not a free agent, and that which does not. The latter does not necessarily make his acts invalid. A person who is undoubtedly laboring under an insane delusion may in some cases make a will or a contract, if the delusion is such as not to influence what he is doing, for instance if he imagines that his legs are made of glass. Any insane delusion, however is evidence of mental incapacity. But a mental weakness or delusion that affects the act makes a will void, for

instance if a lunatic imagines that his wife and children are plotting against his life, and from resentment at this leaves his property away from them. The same is the rule as to marriage.

Agreements.

In regard to other juristic acts, such as agreements, there have been three different rules (1) That a person should not be permitted to stultify himself by his own plea, that is, to plead in his defence to an action his own want of understanding; the effect of which was that his agreements were valid and binding upon him. This rule seems to have arisen from a misunderstanding or strained construction of some ancient authorities, and, though it prevailed for a while, is now quite abandoned. (2) That if the party is so insane as not to know what he is about, his act is wholly void for want of consent, but in other cases is voidable if the other party knew of his condition. (3) The prevailing rule at present seems to be that his agreements are all voidable, provided his state was known to the other party; if not, they are valid.

Non-contractual obligations.

But an insane person may be bound by a non-contructual obligation for the value of necessaries supplied to him or his family in good faith.

Torts.

An insane person is responsible for torts committeed by him, unless the tort involves a state of mind which he is incapable of having.

Actions.

If he sues or is sued in any civil action, the intervention of his next friend or of a guardian *ad litem* is necessary, as in the case of an infant.[2]

Crimes.

1013. In regard to criminal liability; imbecility or derangement of mind which prevents the person from understanding the nature, consequences or wrongful character of his conduct will excuse the commission of what would otherwise be a crime. And so will the insane belief of the existence of a fact which if it did exist would be a sufficient excuse, such as a belief that God has commanded him to do the act. In those cases *mens rea*, the wrongful intention which is necessary to a crime, is absent. But on the other hand not every kind or degree of mental unsoundness will free a person from criminal responsibility. It will not, if it does not affect his capacity of fully understanding the nature of his conduct. There seems to be such a thing as moral or emotional

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[2] See § 995.

Moral and temporary insanity.

insanity, where the person's intellect and reasoning powers are apparently unaffected, but he is devoid of moral sense, or even possessed by a morbid passion for cruelty or wickedness, or is subject to uncontrollable impulses to do certain kinds of acts. Also a person usually sane may have a fit of temporary insanity, during which he may commit a crime; perhaps only once in his life, and possibly lasting only a few minutes. In case of temporary insanity the only difficulty is that of proof. Insanity sufficient to excuse an act is an excuse, however brief. Uncontrollable impulse without any intellectual derangement is in some places excluded by statute from being a defence. Apart from statute, it is still doubtful how far mere moral or emotional insanity will relieve from responsibility for crime, these states having only been recently recognized as existing. Juries, however, will sometimes make supposed emotional or temporary insanity a pretext for acquitting persons whom they do not wish to convict, and some scandalous failures of justice have occurred in this manner.

Trial of insane persons for crimes.

Commitment to an asylum.

A person can not be tried for a crime while in a condition of insanity that incapacitates him from defending himself. In such cases, and in some places when a person is acquitted on the ground of insanity, the court has power to commit him to an asylum till he is cured.

Drunken men.

1014. A drunken man as to capacity to do juristic acts is like an insane person. Generally drunkenness is no excuse for a tort or a crime, because the party is *voluntarius daemon*.

Public officers.

1015. The duties of public officers are of two sorts: (1) public governmental duties, which are owed only to the state and for whose breach no private person can have any action; (2) what may be called *quasi* private duties, which are owed to individuals, and which may be enforced by a writ of *mandamus* or other prerogative writ on the relation of a private person or by an action for their breach. It has not been found easy to draw the line between these two classes of duties, and there is considerable conflict in the decisions. Generally speaking, if a duty

Public governmental duties.

is imposed upon a public officer for the benefit of the whole community, so that its performance in any given case will benefit the public generally and not some individual exclusively, though it may benefit some individuals more than others, it is a public

governmental duty, while if its performance will be for the exclusive advantage of a particular person, it is, in that specific instance, owed to him. Thus the duty of the members of a legislative assembly to make good laws, of a sheriff to suppress a riot, even though the rioters are seeking only to injure a particular private person or his property, of the police to arrest a criminal, of a judge to attend and hold his court at the time and place appointed, of the proper officers to maintain public schools, of a bank inspector to properly inspect the banks under his charge, and many like duties are purely public, and the only remedy for their non-performance is the impeachment or removal from office of the delinquent officer, or in some cases a criminal prosecution. A duty imposed upon public officers or a municipal corporation to keep high ways and bridges in repair is a public governmental duty. But by statute an action for damages has been given to any person who is injured by a defect in a highway or bridge due to a breach of this duty; and such actions are now very common. Among duties which are owed to private persons, may be mentioned the duty of a judge to hear and decide a case brought before him, and not to proceed in a case of which he has no jurisdiction, the duties of a sheriff as to serving civil process,[2] of school officers to admit a duly qualified child to a public school, and of a recorder of deeds to place upon record a proper deed delivered to him for that purpose.

Duties to maintain and repair highways.

Duties owed to private persons.

But even though the officer's duty is owed to a private person, if he has a discretion as to how he shall perform it, he can not be held responsible in a civil action for the manner in which he in good faith exercises his discretion, though he generally may be for a wilful and malicious abuse of his authority. Thus in the case mentioned in § 813 of a wrong report of the result of an examination, the teacher would not have been responsible if by a mere error in judgment he had marked the papers too low. But a harbor-master whose duty it was to decide where vessels should lie in a harbor, and who had a large discretion in that matter, has been held liable to an action for maliciously,

Discretionary duties.

Wilful abuse of authority.

[2] See § 1019.

in the pretended exercise of his discretionary authority, ordering a vessel away from a wharf with the malicious intention of preventing her from loading her cargo.

Wrongs by public officers.

The distinction must be noted, however, between a breach by a public officer of his official duty and a mere wrongful act done by him ostensibly in the performance of his duty. The former is only a breach of duty because the party is a public officer, the same conduct by a private person would not be unlawful. The latter would be wrongful if done by any one, and the only question is whether the officer is protected by his official authority from responsibility; his public capacity is not the ground of the action against him, but may perhaps be set up by him as a defence. Thus if a sheriff has an execution in favor of A against B's property, and refuses to levy it at all, that is a breach of his official duty; but if under it he takes C's property instead of B's, that is an ordinary trespass against C, and not a mere breach of his special duty as sheriff.[4] So if the officers of a city who have authority to lay out a new street, take a private person's land for that purpose without making compensation, they are responsible to the owner just as if they had done the same thing without being public officers. And the

Commands of official superiors.

command of an official superior is not a justification or excuse to a public officer for doing an unlawful act.

Officers *de facto*.

1016. An officer *de facto* is one who has not been legally appointed, and therefore has really no right to his office, but who has a color of appointment, that is, is not a mere usurper, but has in fact received an appointment which there is some reasonable ground for supposing to be valid; as if, for instance, he is appointed under a statute which is afterwards held by the courts to be unconstitutional and void, or is appointed by a certain executive officer, when by law the appointing power was vested in some other officer or in the legislature, at least if there is any ground for doubt as to what the law

Quasi-possession of the office.

really is. To such an officer a principle is applied analogous to that which protects a possessor.[5] He may be ousted from his office by a writ of *quo warranto* or other proper pro-

[4] See § 736. [5] See § 810.

ceeding on behalf of the state or on the relation of any one who has a better right to the office, but so long as he continues in the actual exercise or *quasi* possession of it, his official acts are as valid as if he were rightfully there. It is impossible for persons who have to deal with a public officer to investigate the validity of his title to his place, and the public business must be continuously carried on. Thus if a court is held by a *de facto* judge, his judgments are valid, or if a contract is made on behalf of a city by a *de facto* officer, it is as binding as if he were legally such officer. A *de facto* officer is also protected from personal responsibility for his acts on the ground of authority or discretion as fully as a lawful officer, but he is not entitled to the salary or emoluments of the office.

Validity of acts.

Exemption from responsibility.

Salary.

1017. The subordinates of a public officer are usually not his agents or servants, but the agents or servants of the state; so that he is not responsible for their misconduct, except so far as he has himself commanded or wilfully encouraged or connived at it. Thus if a clerk in a post office steals a valuable letter or loses it by negligence, the postmaster is not responsible. An exception to this principle exists in the case of the sheriff's undersheriffs, deputies and officers, as has been already explained.[6]

Official subordinates.

1018. Judicial authority is the authority to hear and decide questions presented for decision by the parties to a controversy. It is contrasted with ministerial or executive authority, though the latter may call for the use of discretion and choice between different courses of action in its exercise. A judge, a juryman or any person exercising judicial powers is not liable to a civil action or to any punishment for an erroneous decision in a case where he had jurisdiction to decide at all, or for anything done in carrying out his decision; for instance if a judge wrongly decides in favor of the plaintiff instead of the defendant and then issues an execution to enforce his judgment, under which the defendant's property is seized. This is true of a judge of a superior court, even though he makes the wrong decision knowingly and maliciously, or corruptly because he has been bribed, and also of a juryman. As to inferior judges the

Judicial and ministerial powers.

A judge not liable for error.

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[6] See § 94.

rule is probably the same, though the authorities conflict somewhat. But if the judge has no jurisdiction, he is not really acting as judge at all but is a mere usurper; the proceedings are said to be *coram non judice*, and he is personally responsible for his doings and their proximate consequences. Thus if a court which had no jurisdiction in criminal cases were to try a man for a crime and commit him to prison, the judge would be guilty of false imprisonment.

Acts *coram non judice.*

Sheriffs.

1019. A sheriff or any officer whose duty it is to serve process, that is, to execute writs issued by the courts, in civil cases must accept all process presented to him for service, and may require payment in advance of his fees and security for any expense that he is reasonably likely to have to incur. Since he is personally responsible if he executes the process against the wrong person or property,[7] he may in case of any reasonable doubt also require the party for whom the acts to point out the person or property and to give him security against the consequences of a mistake. He must use due diligence to execute the process according to its tenor, but is not liable if without his fault he is unable to do so. If he seizes goods, his duties as to them are those of a bailee.

Duty to accept process.

Duties in executing process.

Arrest on civil process.

A person may sometimes be arrested in a civil action or proceeding by virtue of a writ or process issued from the court. This may be done either on *mesne* process,[8] that is, on a writ issued before judgment for the purpose of preventing the party from absconding, or on execution, or final process, issued after judgment for the purpose of imprisoning the party until he pays the judgment against him. An officer who arrests a person on civil process owes a duty to the party in whose favor the process is issued to keep the prisoner safety. If he voluntarily permits the prisoner to go at large, this is called a voluntary escape, and the officer can not retake the prisoner, but becomes himself responsible for the claim against him. However the party himself in whose favor the process was issued may recapture the prisoner and deliver him again to the officer. A negligent escape is where the prisoner escapes without the consent of the officer. Negligence

Escape.

Voluntary escape.

Negligent escape.

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[7] See § 736.

[8] See § 1036.

on the officer's part is presumed, but doubtless the officer would be excused if he could show that the escape was due to the act of God, the public enemy or inevitable necessity without his fault, as if the jail caught fire and the prisoners had to be turned loose to save their lives. If the arrest is on final process, the officer is answerable even though the prisoner is rescued from his custody by force, because he had the power of the county[9] at his command to resist the rescue. After a negligent escape the officer may retake the prisoner, and is free from liability if he has him in his custody again before an action is begun against him for the escape.

Rescue.

For an escape of a prisoner held on *mesne* process the officer is liable in an action on the case as for a tort, and may defend himself by showing that there was really no cause of action against the prisoner so that the plaintiff was not been damaged by the escape. But an officer who permits a prisoner held under an execution to escape is liable in an action of debt for the amount of the judgment, there being then no doubt as to the damage.

Liability for an escape.

1020. An alien is a subject or citizen of a foreign state.[10] He is an alien friend or alien enemy accordingly as there is peace or war with the state to which he belongs. Aliens have no political rights;[11] but in modern times alien friends are generally permitted, except in the matter of holding real property, to enjoy the same civil rights as citizens. They are entitled to the protection of the law, may hold property, make contracts and do other juristic acts, and sue or be sued in the courts.

Aliens.

Political and civil rights.

At common law an alien could not inherit real property; nor could any one inherit from or through him. But the fact that the person who would regularly be heir was an alien would not stand in the way of another person's inheritance, as in the case of corruption of blood.[12] The law would ignore the existence of the alien, and the estate would descend to the next heir.

Inheritance of real property.

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[9] See § 95.

[10] For this purpose the states of the United States are not foreign to such other.

[11] In some of the United States resident aliens are allowed to vote.

[12] See § 581.

Purchase of real property.

An alien even at common law could acquire real property by purchase; but could not hold it. It became immediately forfeited to the king. If however the alien conveyed the land away before

Forfeiture.

proceedings for forfeiture were begun, the purchaser from him took a good title, and the king's rights were gone. These common law

Modern law.

rules are now abolished by statute in England and in some of the United States, and aliens are permitted to inherit and hold real property; but in many states the old law remains in force, and also in the District of Columbia and the territories.

Alien enemies.

An alien enemy was formerly very harshly treated, his property being exposed to plunder. But in modern times civilized nations protect the civil rights of alien enemies resident in the country, though the government may expel them if it chooses. Non-resident alien enemies, however, can not sue in the courts, and all contracts between citizens or subjects of different states are suspended on the breaking out of war between their countries.

Trading with the enemy.

Trading with the enemy in war time is illegal without a license from the government, and contracts made in the course of such illegal trade are void. Whether in time of war a non-resident

Who are alien enemies.

alien is a friend or an enemy depends upon his domicile rather than his nationality. A citizen of a hostile state domiciled in a friendly state is not treated as an enemy.

Naturalization.

An alien may become a citizen or subject by naturalization, on which he acquires in the United States all the rights of a natural born citizen except that he can not be President or Vice President. The naturalization of a man extends to his wife and minor children, but not to his children who are of full age. Naturalization is entirely by statute, the common law not per-

In England.

mitting it.[13] In England it was formerly accomplished only by a private act of parliament in each case; but now in both that country and the United States it is by the decree of a court on

In the United States.

the application of the party. In the United States it is divided into two parts. The applicant, having lived at least two years in the country must declare before some competent court his intention to become a citizen and receive from the clerk of the court a certificate that he had done so, which is commonly called

[13] See § 215.

ıg out his first papers; and then not less than three years First papers.
'wards he may be fully admitted to citizenship.

In England an alien may be made a denizan by royal letters Denizans.
nt. A denizan can not hold any public office, but has the
civil rights as a subject, including the right to inherit and
real property at a time when this right was denied to
s.

1021. Foreign states and sovereigns, as well as ambassadors Foreign states and sovereigns.
foreign ministers and their families and suites, but not
ıls, are exempt from the jurisdiction of the courts and can not
ıed. Nor will any action *in rem* lie against the property of
reign state, for instance against a foreign man of war. This
ıption from the local jurisdiction is known as exterritoriality
xtraterritoriality. But such persons may sue in the courts. Suits by governments.
ıonarchical state usually sues in the name of its sovereign, a
blic as a corporation.

CHAPTER LXVII.

CORPORATIONS.

A corporation is a person.

1022. The only kind of artificial persons known to the common law are corporations. A corporation is a legal person, distinct from its members, having its own rights and duties. It is so entirely distinct from its members, that it may deal with them as with outsiders in making contracts, buying and selling, suing and being sued.

Corporations sole.

Corporations are either aggregate or sole. A corporation sole is one that can not have more than one member at a time, being a person and his successors in a particular station, who are incorporated for some reason of convenience. The King in England is such a corporation.[1] The same is true of bishops and certain other clergymen, the reason for considering them as such being that the freehold of churches, tithes and other church property may be vested in a perpetual corporation and not descend to the heir of the incumbent at his death or have to be formally transferred to his successor. It is believed that there are no corporations sole in the United States. A corporation aggregate is normally an association of persons, though in many cases it might continue to exist if by death or otherwise its membership should be reduced to one person.

Corporations aggregate.

Ecclesiastical and lay corporations.

1023. Corporations are farther divided into ecclesiastical and lay The former are created for ecclesiastical purposes and are composed entirely of ecclesiastics, for example the dean and chapter of a cathedral. In the United States churches are usually incorporated, or at least the property of the church is held in trust for it by some sort of a corporation, such as an incorporated board of trustees. These bodies are generally called ecclesiastical corporations, but probably are not such in the technical sense, being usually composed of laymen.

Churches in the United States.

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[1] See § 59.

Lay corporations are divided into eleemosynary and civil. An eleemosynary or charitable corporation is one that is founded for some charitable or religious purpose, such as to maintain a hospital, a school, or probably in the United States a church. A civil corporation exists for purposes of business or pleasure, as a city, a bank or a club.

Eleemosynary corporations.

Civil corporations.

1024. Corporations are either public or private. The former, which are also called municipal corporations, have been created for the purposes of government. Such are cities, boroughs and incorporated towns or villages. The United States is a public corporation, and so is each state. A public corporation is always located within fixed territorial limits, within which it exercises powers of government, and all citizens living within those limits are members of the corporation. Municipal corporations are either full or *quasi* corporations. A full corporation has the attributes of personality for all purposes, is fully a person. A *quasi* corporation is one that is regarded as having the attributes of a corporation only for certain special purposes, but for most purposes is merely a territorial division and not a corporation at all. Such are counties, townships and school districts in most places. Thus in England in a case where the repair of a certain bridge was a county charge, it was held that the county could not be sued for an injury caused by the disrepair of the bridge, because for that purpose it was not a corporation. In Massachusetts a similar decision was made as to a township, although a township is so far a corporation that it can hold property and be sued for a debt.

Public and private corporations.

Full and *quasi* corporations.

Municipal corporations have a double character. In one aspect they are a kind of artificial persons, and many of the ordinary laws relating to corporations apply to them; in another aspect they are a kind of public officers, and as such the duties with which they are charged may be public or may be owed to private persons, as in the case of other public officers. Generally any duties imposed or voluntarily assumed by them for the benefit of their own inhabitants only, such as supplying gas or water, are regarded as private duties. The officers of a municipality are its servants or agents, like the officers of other corporations, in regard to its private duties and business, and it may be

Double character of public corporations.

Public and private duties.

Officers of public corporations.

held responsible for their acts or omissions in the course of its business; but as to its public duties, they are not its agents but are themselves independent public officers. Thus if a policeman appointed by a city should arrest a person illegally, the city would not be liable for the wrong; but if the city, being bound to keep water pipes in repair and liable to an action for a defect, had charged the policeman with the duty of reporting any defect in a pipe and the policeman negligently omitted to report a defect which he had observed, so that the pipe remained in a defective condition and some one was injured thereby, the city would be answerable for that negligence of its servant.

Quasi-public corporations.

There are certain corporations which are organized for purposes that are regarded as public or *quasi*-public, such as banks or railroad, bridge or turnpike companies. These are often spoken of as public corporations; but they are legally private, not being created for the administration of political or municipal powers but for business purposes, and being managed not by public officers but by private persons. To such corporations the state often grants special franchises or delegates the exercise of its right of eminent domain, as where railroad companies are authorized to take land for the construction of their roads against the will of the owner; and the state, in consideration of the grant of such unusual powers and of the interest which the public have in the proper performance by those corporations of their functions, usually exercises a greater degree of control and supervision over them than over corporations in general, for instance interfering to regulate the rates of fare on railroads, the situation of stations or the times of running trains, or providing for the inspection of the affairs of banks and insurance companies.

Corporations with and without stock.

1025. One of the most important divisions of corporations at the present day is into those which have and those which have not capital stock. Almost all business corporations belong to the former class. The name joint stock company, which in England means a peculiar kind of partnership,[2] in the United States is generally used to denote this sort of a corporation.

Joint stock companies.

[2] See § 866.

; stock companies in the English sense are governed by
antially the same rules as stock corporations.

The proprietary interest which its members have in such a oration is considered to be divided into a number of equal , which are called shares of stock.[3] These shares are pro-, and the owners of them, who are called shareholders or holders, constitute the members of the corporation. Each holder receives from the corporation a written certificate of , stating that he is the owner of a certain number of shares. ockholder may have a single certificate for all his shares or ate certificates for different portions of them at his pleasure. The amount of capital which the company is to have for ing on its business is fixed by its charter or by-laws, and the number of its shares. The quotient found by dividing value of the capital by the number of shares gives what is l the par value of each share. Thus if the company a capital of $1,000,000 and is divided into 10,000 s, the par value of each share is $100. Therefore it ommonly said that the capital of the company is divided shares, or that the shares are aliquot parts of the al or corporate property. But that is not strictly correct. holder of a share does not own a proportional part of the any's property; that is all owned by the company itself as a ical person. What the stockholder owns is an interest in the ration, which gives him, it is true, a certain interest in its rty, but only indirectly through the company not directly as ietor. If the actual value of the property or assets of the any is equal to its nominal capital, then the par value of hares is also their real value. But the assets of the com- may be greater or less than its nominal capital, in which the real value of the shares will be above or below their alue. Also their market price, which ought to conform to real value, may be raised or depressed by speculative dealings e stock market. One of the most serious evils now affecting stock corporations is the use by its officers of the power

Shares of stock.

Stockholders

Certificates of stock

Capital.

Par value of shares.

Nature of stock.

Actual value of shares.

Stockjobbing by officers.

[3] The word stock originally denoted the capital or property of the ation, and is still often used in that sense.

which their position gives them to affect the price of its stock for speculative purposes. This is a gross fraud and breach of trust, because the officers hold their powers purely as trustees for their stockholders; but it has been found very difficult and often impossible to prevent it.

Subscriptions for stock.

When the company is first organized such persons as see fit subscribe for shares, and each subscriber agree to contribute to the company's capital a sum equal to the par value of the shares for

Payments for shares.

which he has subscribed. The intention of the law is that the shares shall in this manner be fully and honestly paid for in money or money's worth, so that the actual capital of the company shall be the same as its nominal capital; and the statutes regulating the formation of stock companies contain many and stringent provisions to that end. But these are frequently evaded by getters up of companies, and a large nominal capital often stands for very little actual value. When the nominal or par value of all the shares is intentionally made greater than the actual value of the company's assets, so that a part of that nominal value really represents nothing, the stock is said in common parlance to be watered. A very common practice is not to require payment in full for stock at once from the subscribers, but to leave a portion to be paid in instalments as the company needs it, and as it is called for by the managers of the company. Any holder, whether an original subscriber or a transferee, of stock which is not fully paid up and on which a call for an instalment is made is bound to pay the call, which obligation is a debt, and may be enforced either by a suit against him on the company's part or by the seizure and sale of the stock. In what is called a limited company, after the full par value of a share of stock has once been paid in on it, it is not subject to any further calls, so that the stockholders of such a company can not be made liable in any manner for its debts beyond the amount which may remain still unpaid on their stock. The advantage of this is that a person may invest a limited amount of money in a company without exposing himself to any risk beyond that of losing what he puts in, if the company is unsuccessful; its disadvantage is that, if the company fails, its creditors can only look to the property of the company itself for payment of their debts, and

Watered stock.

Calls on stock.

Limited companies.

hat is insufficient must go unpaid. In an unlimited company individual stockholders are responsible for all its debts to the ole extent of their property, as partners are for the debts of the a; and calls may be made upon the stock to any extent that y be necessary. Sometimes the creditors can sue the stockders directly, and if in that way any stockholder is compelled pay more than his just share, he may have contribution from others, each one being bound to contribute to the payment the company's debts in proportion to the amount of stock that holds. In an unlimited company without capital stock the mbers contribute equally. Unlimited companies.

1026. Stock can be assigned, and is transferred by entries books kept by the company for that purpose. On such a nsfer the transferrer's certificate is surrendered to the company l cancelled and a new one issued to the transferee. The nsferrer usually gives the transferee a power of attorney to make transfer, so as to avoid the necessity of both parties attendin person at the company's office, which power is often orsed on the certificate. A practice prevails in the United tes of executing such an indorsed power of attorney leaving name of the transferee blank, so that the stock may be sold r and over again without formal transfer, the certificate being rely delivered to the buyer, until at last some buyer inserts his a name in the power and has the stock transferred to him. is is contrary to the rule of the common law that a deed st be complete when delivered, and the validity of such a nk power, if under seal, has been doubted. But the custom now become so well established that in many places the rts have regarded it as having the force of law. An ignment of stock without a transfer on the books of the ipany is valid between the parties, but the company need recognize the assignee as a member. Transfer of stock. Power to transfer. Powers in blank. Assignment without transfer.

The profits accruing from the company's business are divided ong the stockholders in proportion to the number of shares of k held by them respectively. These dividends are usually oned in the form of a percentage on the par value of the res; thus a dividend of five per cent, if the par value of a re is $100, means that each stockholder is to receive five Dividends.

dollars for each share of stock that he holds. Sometimes a portion of the profits which might be distributed as dividends is retained and added to the capital, and additional shares of stock are issued and given to the stockholders to represent this increment of capital. That is called a stock dividend.

Stock dividends.

Scrip.

Scrip is a name for written documents issued by a company to shareholders certifying that they are entitled, absolutely or on conditions, to recieve dividends or certificates of stock. Sometimes scrip is issued to subscribers before the regular certificates of stock have been prepared, as a kind of provisional certificates.

The formation of corporations.

1027. Persons can not associate themselves together and become a corporation at their own mere pleasure. A franchise or permission from the state is necessary, which franchise is a kind of property owned by the corporation. Corporations may be formed in the following ways.

By common law.

1. By the common law. Many public or ecclesiastical corporations are such merely by virtue of a principle or rule of the common law which declares that they shall be; it is not necessary to show that any franchise was ever granted to them. That is the case with the King or a bishop in England; and in the United States when a new township or county is created it becomes a corporation as a matter of course, although the statute which creates it does not declare expressly that it shall be one.

By prescription.

2. By prescription. There are certain corporations, usually municipal, ecclesiastical or eleemosynary, which have been corporations time out of mind, and whose origin is not known, such as the city of London. It is presumed that at some time in the past franchises were granted to them. But a corporation can not acquire a franchise by mere adverse user for the ordinary period of prescription.

By charter.

3. By charter, or written grant from the state. In England a charter may be granted by the King or by Parliament. The King may delegate the power of chartering corporations to a subject, as has been done, for instance, to the chancellor of the university of Oxford. In the United States charters are only granted by the legislature. Some of the state constitutions forbid the legislature to grant charters for private corporations, or for certain

kinds of private corporations. A charter for a private corporation must be accepted by the grantees, and becomes an agreement between them and the state. Amendments and alterations of the charter must likewise be accepted, unless the state has reserved the right to amend or alter at its pleasure, as it often does. This does not mean that the sovereign has no power to force a charter upon unwilling recipients or to take away chartered rights against their consent, but merely that the courts will presume that the granting or amending of a charter was intended by the King or the legislature to be conditional upon acceptance. But in the United States chartered rights granted by a state are protected against legislative interference by the provision in the national constitution that no state shall make any law impairing the obligation of contracts; so that a state having once granted a charter can not revoke or amend it without the consent of the corporation, unless it has reserved in the grant the right to do so.

Acceptance and amendment of charters.

(4) Under general statutes. At present by statute persons are permitted to form corporations for lawful purposes in the manner pointed out in the statute. The incorporators must execute a written instrument, usually known as articles of association or a deed of settlement, containing a description of the proposed corporation, its name, the nature of its business, the place where it is to be located, its capital stock, the number and par value of its shares and sometimes other particulars, and file this in some designated public office. Sometimes other formalities are required. The details of these statutes vary greatly in different places.

Under general laws.

Articles of association.

The charter, articles of association or other documents by virtue of which a corporation exists or by which its powers are defined are called its constating documents. But the word charter is often used instead, for shortness, even when the corporation is organized under articles of association without a proper charter.

Constating documents.

1028. The usual attributes of a corporation are:

Attributes of a corporation.

(1) To have a corporate name.

Name.

(2) To have a seal. It was formerly considered that a corporation could not make any contract except by deed under

Seal.

its corporate seal; but that doctrine is now obsolete, and corporations may contract through their authorized agents in the same manner as other persons.

Powers. (3) To be able to sue and be sued, do juristic acts and acquire and hold property. The statutes of mortmain, where they Property. are in force, restrict the holding of land by corporations, for which reason it is usual to insert in their charters or in the statutes under which they are formed a permission to hold real property, though sometimes the amount of real or even of personal property which they may hold is limited.

Perpetual succession. (4) To have perpetual succession; that is, the continuity of the corporate existence is not affected by changes in its membership, and, its property and obligations belonging to the corporation itself and not to its individual members, it is not necessary for transfers or novations to be made when members leave or new ones come in. The duration of the corporation is not however necessarily perpetual; a corporation may be created to endure for a limited time.

By-laws. (5) To make by-laws for its own government. These must be reasonable and not contrary to law, otherwise they are void.

Acts *ultra vires*. A corporation must use its powers only for the purposes for which it was created, which are expressed in its constating documents. Any act done for any other purpose is said to be *ultra vires*. Thus it would be *ultra vires* for a bank to engage in the business of insurance, or for a church or a club to carry on trade. But a corporation may do acts outside of its regular business incidentally in aid of that business; for instance a manufacturing company having its mill in the country remote from any town or village may build houses and let them to its operatives or provide a church or a school house for their convenience, or may keep a store where they may purchase their supplies; and a savings bank which has lent money on a mortgage, foreclosed the mortgage and got the land, may sell or let

Validity of *ultra vires* act. the land. There has been much difference of opinion as to the nature and validity of acts *ultra vires*, and the law is still in an unsettled state. Some courts have held that the corporation has no power in the strict sense *i.e.* no capacity, to do such

acts, so that they are simply void, not being in fact the acts of the corporation at all. But other courts adopt the theory that the corporation, being a person, has the legal capacity to do any sort of acts, and that acts *ultra vires* are simply acts which it ought not to do, which for it are illegal, and that therefore, while the corporation itself can not take any advantage of such acts or enforce against a third person a contract which is *ultra vires*, it may be responsible for such acts and contracts to outsiders who deal with it in good faith. If the corporation is about to do an act which is *ultra vires*, any stockholder may obtain an injunction to prevent it. The expression *ultra vires* is also used in a different sense to denote, not acts which the corporation itself can not or ought not to do, but acts which are in excess of the authority conferred upon the particular officers or agents of the corporation who undertake to act for it in the matter. Thus if the board of directors should attempt to do something which legally could only be done by a stockholders' meeting, the act would be *ultra vires* for the directors though not for the corporation. The validity of such acts depends upon the rules of the law of agency.

Acts *ultra vires* for agents only.

1029. A corporation, being merely an invisible intangible creature of the law, is subject to certain disabilities. In legal proceedings it can not appear in person, but only by attorney. It can not be arrested or outlawed;[5] nor can it be excommunicated, for which reason the ecclesiastical courts in England can not take jurisdiction over it. Also because it is unable to take an oath for the faithful performance of its duties, it was not allowed by the old law to be an executor or administrator. It was also formerly considered impossible for a corporation to be a guardian or trustee of an express trust or to be seized to uses. But at present corporations are often created for the express purpose of acting as executors, administrators, guardians and trustees;[6] and an implied or constructive trust always might exist against a corporation. A corporation is incapable in its

Disabilities of corporations.

Corporations as trustees etc.

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[5] See § 1037.

[6] These are usually called trust companies. They often do business as bankers.

Crimes. corporate capacity of committing most kinds of crimes, but for certain offences a corporation may be indicted and fined, for instance it may be guilty of making a public nuisance or of a criminal omission. It was formerly thought that a corporation

Torts. could not be held responsible in a civil action for a battery, slander or other personal injury or for a malicious tort; but it is now settled that a corporation, like a natural person, may be responsible for all sorts of torts committed under its authority by its agents or servants.

Membership in corporations. **1030.** A person becomes a member of a stock corporation by acquiring the ownership of stock, and loses his membership when he parts with his stock. He can not be expelled by the act of the corporation itself. In other corporations aggregate new members are usually admitted by election, and a member may be expelled for misconduct affecting the interests of the corporation or for any cause prescribed in the regulations of the association, but only after a fair hearing and an opportunity to make his defence.

Internal government. **1031.** The government of a corporation aggregate is democratic in its character. Subject to the provisions of the law or

Organic law. of its constating documents, which form a kind of constitution or organic law, the supreme legislative authority is vested in

The general meeting. the general meeting of the members. In stock corporations each stockholder has one vote for each share of stock which he holds, and may generally cast his vote by proxy. The actual adminis-

The directors. tration of the ordinary affairs of the corporation is usually committed to a council or board of persons elected by the members, who are generally called directors, trustees or managers,

Officers. and to various executive officers chosen either by the stockholders or by the directors. Some corporations have by their constitution

The head. a head, often called a dean, warden or master, who is more than a mere presiding officer, being an essential part of the corporation, so that if his office is vacant the corporation is for the time being incomplete, and can not do any act except to fill the vacancy, nor can it receive any gift or grant of property. But most corporations, particularly business corporations, have no such head, but choose for themselves such officers as are necessary.

Ecclesiastical and eleemosynary corporations are also subject to the jurisdiction of a visitor, who has authority to correct irregularities and abuses and sometimes to appoint or remove officers. Ecclesiastical corporations in England are usually visited by the bishops, they by the archbishops, and these in turn formerly by the Pope and now by the King as the head of the church. The founder of an eleemosynary corporation or his heirs or assigns is often in England, and possibly sometimes in the United States, invested with visitatorial powers, and sometimes the charter of a corporation appoints some person or persons as visitors; thus a theological seminary might be subject to the visitation of some authority of the church or sect to which it belonged, for the purpose of preventing it from teaching heretical doctrines. When there is no other visitor, the King is the visitor, and exercises his power through the Chancellor. In the United States the state exercises this function through the courts of equity. Visitation.

1032. A corporation may be dissolved in various ways. (1) By the expiration of the term for which it was originally created. (2) By statute, except in the United States so far as the national constitution forbids this.[7] (3) By surrender of its franchises to the King or state. (4) By forfeiture. A corporation may forfeit its franchises by non-user or mis-user. The forfeiture does not of itself put an end to the existence of the corporation, but gives ground for a legal proceeding on the part of the King or the state, usually by *quo warranto*[8] or *scire facias*,[9] to enforce the forfeiture and wipe not the corporation. (5) In modern times, by winding up or liquidation. If a business corporation becomes insolvent or for any reason is unable to go on with its business, the stockholders may in most places vote to discontinue the business and wind up the company, or a court of equity in a proper case on the petition of a part of the stockholders or of creditors, or sometimes of certain public officers, may make an order to that effect. This may or may not involve the dissolution of the corporate body, the law is different in different places. Sometime the corporation continues to exist after its business has been wound up, and may even have power to begin business again. Dissolution. Lapse of time. Statute. Surrender. Forfeiture. Winding up.

[7] See § 1027. [8] See § 934. [9] See § 937.

Disposition of its property.

At common law when a corporation was dissolved all debts due to or from it were extinguished, and its real property reverted to the grantors or their heirs, while its personal property went to the King. But at present the law provides for the winding up of the corporation by persons appointed for that purpose, generally called receivers, liquidators or trustees, who perform for the corporation nearly the same functions as executors and administrators do for natural persons. They receive all the property of the corporation, including its real property, collect all debts due it, pay all debts and claims existing against it, and hand over the surplus to its stockholders or members. They have power also to make calls upon the stock, in limited companies to the extent of what remains unpaid on it, in unlimited ones to any extent, or to require contributions from the members of corporations having no stock, in order to raise money to pay claims against the corporation or the expenses of liquidation.

Liquidators.

Calls.

Unincorporated associations.

1033. An unincorporated association, a society or an ordinary partnership, is not an artificial person. Its property, its contracts, its rights and its duties belong to the individuals who compose it, jointly or in common. When a member leaves or a new one comes in, there must be a transfer of its property. In an action by or against it all its members must be parties. Therefore it is generally more convenient to have the property of an unincorporated association held for it and its contracts made for it by trustees. But in most places at the present time it has been provided by statute that such associations may sue or be sued in their common name or in the name of their president or some other officer, and judgments against them in such actions can be enforced against their common property only. To that extent therefore they are treated as juridical persons and are assimilated to *quasi* corporations, though not usually so called.

Actions and judgments.

SUBDIVISION VI. ADJECTIVE LAW.

CHAPTER LXVIII.

COMMON LAW ACTIONS.

1034. As has been already explained,[1] a person who desired to institute a suit in the King's courts began by purchasing or ıg out an original writ. In the popular courts this was not essary, because every one had a right to sue in those courts hout any permission from the King. The same was originally ɜ of the private courts, but in real actions writs came to be d there also. The original writ.

An original writ "of course", with which an ordinary action ı began, was either a *praecipe*, which was used when some ain thing was demanded by the plaintiff, such as the payment a debt or the possession of land, and which ordered the sheriff command the defendant either to do the thing demanded by plaintiff or to appear in court on a certain day and show se why he did not do it; or a *si te fecerit securum*,[2] when suit was for unliquidated damages for a wrong, which ordered sheriff, if the plaintiff should give proper security for pro- ıting his suit, to summon the defendant to appear in court. ɜ writ could not give the defendant the option either to do the demanded or to appear, because the damages were uncertain der either writ the defendant was not to be summoned to ɐear until the plaintiff had given to the sheriff security in the n of a recognizance with sureties that he would go on with suit. Formerly a plaintiff who brought a groundless action in King's courts, or who abandoned his action, was amerced in a ı for the king's benefit, and the bond was required to secure payment of the fine. In later times the fine ceased to be

Praecips.

Si te fecerit securum.

Security for prosecution.

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1 See § 180.

2 These writs were named from certain important words in them. former began with the word "Command," the latter with the words he shall make you secure."

exacted, and the bond became unnecessary. But the ancient form was retained, and for a long time the sheriff continued to go through the form of reporting to the court that he had taken security, always naming as the sureties or bondsmen two fictitious persons, John Doe and Richard Roe.

Service of the writ.

1035. The plaintiff gave the writ to the sheriff, who on receiving it sent to the defendant by two of his messengers, called summoners, a summons to appear in court on the day named

Summons.

in the writ. The summons was generally served upon the defendant by giving or reading it to him personally or leaving it

Return of the writ.

at his dwelling. The sheriff had then to return the writ, that is to bring it to the clerk of the court, who filed it in his office. This was the authority to the court to proceed with the action. The sheriff was also required to make a report in writing to the court of what he had done under the writ, which was also called his return. The word return thus has two meanings: (1) the bringing the writ to court and filing it there, and (2) the sheriff's written report of his doings. All writs have to be returned in like manner. The common law rule was that a return to a writ

The return was conclusive.

was, for the purpose of the proceeding in which the writ was issued, conclusively presumed to be true, and a party was not permitted in the proceeding itself to dispute its correctness. But if it was in fact false, any party injured thereby could have an action for damages against the officer for a false return. At present that rule is sometimes adhered to and sometimes not; but there is at least a *prima facie* presumption that a return is true.

Return days.

In each term of court there were certain "days in banc," also called the "returns" of the term, on some one of which the defendant must be summoned to appear, or, in technical language, the writ must be made returnable. One of these was

Essoign day.

the first day of the term, on which day the court sat to take *essoigns* or excuses for non-appearance, for which reason this was called the essoign day. But the defendant had three days' grace, and if he appeared on the fourth day inclusive after the return day, *quarto die post*, it was sufficient.

Defendant's refusal to appear.

1036. If the defendant refused to appear in obedience to the writ, it was considered in ancient times that the court had no authority to proceed with the suit in his absence, so that the

step was to issue process to compel him to appear. Process Process.
general name for writs issued out of the court itself, under
al of the court, in contradistinction to writs issued from Chan-
nder the King's great seal. Having once been authorized
e King's original writ to take cognizance of the suit, the
had authority to issue itself any further writs that might
eded. These are also called judicial writs, and are tested
n the name of the King but of a judge of the court. Process
between the original writ and the final judgment of the *Mesne* process.
in the action was called *mesne* or intermediate process,
that which was issued after the judgment to carry it into Final process.
was known as final process. Sometimes however the process Original process.
to compel the defendant to appear, being founded upon
riginal writ, is called original process.

1037. Process in the court of Common Pleas was as follows. Attachment.
a writ of attachment, or *pone*,[3] which commanded the
f to seize some of the defendant's property as a gage, or
e, which he was to forfeit if he failed to appear, or to make
furnish safe pledges, or sureties that he would appear. In
ıs for forcible or fraudulent injuries process of attachment
ssued against the defendant at once, without any summons
g been made under the original writ. If after attachment
efendant failed to appear, he forfeited his security, and a
of *distringas*, or distress infinite,[4] was issued against him, *Distringas.*
anding the sheriff to take from time to time his goods and
rofits, or issues, of his lands, till if necessary all were taken.
were forfeited to the King if the party still refused to appear,
ı later times were sold by order of the court for the plaintiff's
lt. Here the process ended in case of all injuries without
It was supposed that, the defendant having been stripped
his property by repeated seizures under the *distringas*, it
f no use to proceed further against him. But in forcible
es, to punish the defendant, the law allowed a further writ *Capias.*
pias ad respondendum, which ordered the sheriff to take
ody of the defendant, *i.e.* to arrest him, and bring him

So called from the words contained in it: "Put by gage and safe
s the defendant, so that he be before the justices" *etc.*
See § 893.

before the court to answer the plaintiff's complaint. In order to get the advantage of this writ in actions for injuries not committed by force, the practice grew up of taking out a writ for a fictitious trespass and also (*ac etiam*) for an injury of some other kind, such as the non-payment of a debt, and then, by the connivance of the court, when the defendant had been arrested for the supposed trespass, ignoring that and proceeding with the suit for the other wrong only. The part of the writ of trespass in which the other wrong was mentioned was known as the *ac etiam* clause. This practice once begun continued, although afterwards by various statutes writs of *capias* were allowed in actions for debts and for most kinds of wrongs.

The *ac etiam* clause.

If the sheriff could not find the defendant in his county, he made a return to the writ of *non est inventus*, after which another *capias* might be issued to the sheriff of some other county where the defendant was supposed to be. This was called a *testatum capias*, because, after mentioning the former writ and the unsuccessful attempt to execute it, the writ alleged that it was testified to the court that the defendant lurked or wandered about in the latter county.

Non est inventus.

Testatum capias

If the defendant had absconded, the plaintiff might proceed to have him outlawed. This required the issue of several other writs, all of which being returned unexecuted, the court ordered the sheriff to proclaim the defendant an outlaw for his contempt of the court's authority in contumaciously refusing to appear before it, the effect of which was that all the defendant's goods and chattels were forfeited to the King and he himself was put out of the protection of the law and could bring no civil action in any court for any wrong done him; he was said to have *caput lupinum*. But he was still protected by the criminal law; it was not lawful to kill or beat him; and on his appearing and submitting to the court's jurisdiction and paying the costs of the proceedings, the court would reverse the outlawry.

Outlawry.

1038. A suit might have been begun by original writ in the King's Bench; but as it was regularly the duty of that court to take cognizance of trespasses, a special writ authorizing it to do so was not necessary. Usually therefore a suit was begun by a plaint lodged with the court of a trespass, upon which a judicial

Process in the King's Bench.

; known as a bill of Middlesex[5] was issued, which was sub- Bill of Middlesex.
ıtially the same as a *capias*, and commanded the sheriff to
ıst the defendant and bring him before the court. It was by
insertion of an *ac etiam* clause in this bill that the King's
ıch contrived, as has been mentioned,[6] to usurp jurisdiction in civil
ons other than for trespasses; the defendant, having been ar-
ed for the supposed trespass, could be proceeded against for a debt
ther claim. If on the bill the sheriff returned *non est in-* Further process.
tus, a second writ called a *latitat*, equivalent to a *testatum*
ias, was issued to the sheriff of another county. In the Ex- Process in the Exchequer.
quer there was no original writ, but on the presentation by
plaintiff of a plaint alleging, as has been already explained,[7]
; he could not pay a debt which he owed to the king because
defendant was withholding his due from him, a kind of process Writ of *quo minus*.
wn as a writ of *quo minus* was issued, on which the defendant
arrested as on a *capias*.

1039. In time the proceeding by original writ or plaint Shortening of the proceedings.
wed by process was shortened by simply assuming all the
ious steps to have been taken and issuing at once from the
t in which the action was brought the particular kind of
ess required actually to bring the defendant into court, all
ious writs and the returns to them being, if occasion required,
le up afterwards and dated back; so that practically all suits
e to be begun by a *capias* or some writ equivalent to a *capias*,
ıout any original writ or plaint. A judicial writ by which a Mesne process.
is begun is still called *mesne* process, though the name is no
er appropriate.

1040. At first the defendant was always actually arrested Arrest.
er a *capias*. He then had the right to give bail, or security
he sheriff for his appearance, and be released. Every person Bail.
sted on *mesne* process in a civil action still has this right.
is given in the form of a recognizance entered into before
clerk of the court or a commissioner appointed for that

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[5] So called because the court sat at Westminster in the county of Mid-
x. If it sat in any other county, as it might do in ancient times
ı it followed the King's person, the writ would take the name of that
ty.

[6] See § 184. [7] See § 184.

purpose, by the defendant as principal with two bondsmen or sureties by which they acknowledge themselves indebted to the sheriff in a certain sum conditioned that the defendant appears in the action. If he does appear, the condition is satisfied, and the sureties are discharged; if he does not, an action on the bond can be brought by the plaintiff, in the name of the sheriff who is the nominal obligee, against the sureties for his claim. The sheriff is absolutely bound to accept bail, if sufficient bail is offered. If he improperly refuses, he is guilty of a false imprisonment, and the prisoner may have himself brought before the court on a writ of *habeas corpus* and be admitted to bail by the judge. If the sheriff takes insufficient bail and the defendant fails to appear, that is an escape for which the sheriff is responsible to the plaintiff. Bail given to the sheriff to secure a party's appearance merely is called bail below. If the party arrested does not give bail, he is detained in jail.

Bail below.

Rights of bail.

The sureties on the bail-bond are themselves called bail. A person who is released on bail is supposed to be in the custody of his bail. They have the right actually to arrest him at any time or authorize another person to do so, without any warrant or order from the court, and surrender him to the sheriff, and so free themselves from their obligation. As evidence of their authority they may obtain from the clerk or the commissioner a memorandum of the bail-bond, which is called a bail-piece.

Arrest partly abolished.

But in modern times it came to be thought too harsh to arrest a defendant in an ordinary civil suit; and so, at first by usage and the indulgence of the courts, and later by various statutes beginning in the reign of George I, the defendant, except in certain cases, was not actually arrested but merely notified of the *capias* and summoned to appear; whereupon, as if he had been arrested, he went through the form of giving bail, the sureties, however, being merely the same two fictitious persons, John Doe and Richard Roe, who had formerly served as sureties for the plaintiff, and who were called common bail. Finally in the reign of William IV it was enacted by statute that when the defendant was not to be actually arrested a writ of summons, simply notifying the defendant to appear, should be used instead of a *capias*. On a summons common bail is not necessary.

Common bail.

Summons.

When arrest is allowed.

The cases in which a defendant might be arrested in a civil on have not been always and everywhere the same. Until into the last century arrest was generally allowed, even in nary actions for debts where no fraud or active wrong doing charged against the defendant, unless the debt was very ll, in England under £10. But the modern law is less severe, st being allowed in only a few cases, which will be metioned afterwards.[8] For the arrest of the defendant a *capias* continued to he proper process; and the plaintiff had to swear to the amount of debt or, when the action was not for a debt, a sum had to gnated by an order of the court, which was the amount for ch the defendant had to give bail, and which was endorsed on writ. In this case the bail was real bail with real sureties, was called special bail.

Special bail.

Appearance in person or by attorney.

1041. The parties may appear in person or by their rneys. If an attorney at law, whose profession it is to appear act for parties in suits, and who is an officer of the t, appears for a party, the court takes judicial notice of his acter as an attorney, and will not require proof of his authoto represent the party for whom he appears. Even if in he appears without any authority, still the party is bound his acts, though he may have an action against the attorney damages. If a party chooses to appoint an attorney in fact epresent him, instead of an attorney at law, he may do so; appointment must be by a written power of attorney.

Authority of an attorney at law.

Attorneys in fact.

Appearance.

The ancient mode of appearing was for the parties or their rneys actually to come into court. If however either party prevented by any good reason from appearing, he was perted to send an *essoign*, or excuse, which, if found sufficient the court, operated to postpone the case. By means of *igns* the trial of cases was often greatly delayed. One on for the superiority of the royal courts over the popular ts was that fewer *essoigns* were allowed. A party could *ign* himself, and so procure a postponement of the case, only on the original appearance day, but on any day in the se of the case when his presence was required in court.

Essoigns.

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[8] See §§ 1072, 1133.

General and special appearance.

Appearance might be, and still may be, either general, for the purpose of contesting the action, or special for the purpose of raising the objection that the action has not been properly begun, for instance that no proper service of the writ or process has been made upon the defendant. In such a case appearance is not strictly necessary, because no valid judgment can be rendered. But as even an invalid judgment might cause the party inconvenience, he may appear specially and take his objection, if he chooses.

Failure of defendant to appear.

If the defendant, not having been arrested, failed to appear, the courts found themselves in the same situation as in ancient times when the defendant disobeyed the summons on the original writ. They had legally no authority to proceed in his absence. In modern times, however, instead of issuing farther process to bring him in, they permitted the plaintiff to enter a formal appearance for him, and if necessary to put in common bail in his name. Then, the defendant being apparently in court, the court proceeded as if he were really there. Thus by a fiction and without departing from old forms, the courts of law adopted the rational principle that if a defendant had been duly notified and had a chance to appear, his refusal to do so should not prevent the suit from going on.

Entering appearance for him.

Bail above.

1042. If the defendant has given bail for his appearance, he must on appearing put in bail to the action, or bail above, that is, must give security that he will pay any judgment that may be given against him or surrender himself to the sheriff. This will be common or special bail according to the nature of the bail given below. When special bail has been given to the sheriff, if the defendant fails to put in proper bail to the action, the sureties on the former bail bond, or if they are irresponsible persons, the sheriff, become answerable to the plaintiff for his claim. Special bail above must be perfected, if the plaintiff excepts to the sureties as not sufficient; that is, the sureties must appear before a judge of the court or a commissioner and justify, *i.e.* swear that they are worth the sum for which they have become bail over and above all their debts. Bail below need not be perfected, because the sheriff is responsible if he takes bad bail.

Perfecting bail.

1043. Having appeared, the parties in ancient times then e oral statements of their claims, which were noted down by the :. These were called pleadings, or collectively the *parol*. From Norman conquest till the reign of Edward III the proceedings in Norman French. In that reign it was enacted that oral eedings in the courts of law should be in English but the rds be kept in Latin. In 1730 English was substituted for n as the language of the records, but many of the old ıch and Latin words and phrases have continued in use as nical terms. In the United States legal proceedings and rds have always been in English. Pleadings. Language of the law.

The plaintiff began the pleadings by a declaration, which also called a *narratio*, count or tale, containing a statement he facts of his case and a demand for the relief to which leemed himself entitled. Before the defendant could be put is defence the plaintiff had as a general rule to furnish to court some sort of *prima facie* proof of his claim; unless lid this, his action was at once dismissed. Therefore at the of his declaration he added a formal offer to furnish such f. This was usually done by means of witnesses, who were d the plaintiff's *secta*, suit or following. If his claim was d upon a deed, he must declare that he had it in court was ready to produce it, or in technical language must make *ofert*, or offer, of it. This preliminary proof required of the ıtiff at the time of his pleading must be distinguished from proof offered at the trial. Just as on the original writ the ıtiff, before the defendant could be summoned at all, had ive security to duly prosecute his suit, so at the time of ding he was again called upon to furnish pledges for its ıer prosecution and for the payment of any sums that in he failed in his suit might be awarded against him *pro o clamore suo*, either to the defendant or by way of fine to the ;. This in time became merely formal, the names of John and Richard Roe being entered as sureties, who were called mon pledges of prosecution. Declaration. Preliminary proof. Suit. Profert. Security for prosecution. Common pledges of prosecution.

1044. The defendant then made his defence. This in the technical sense meant merely a formal denial of the ıtiff's right, corresponding to the *litis contestatio* of the civil Defence or *litis contestatio*.

law; it was a notification that the defendant intended to contest the suit and not to submit to the plaintiff's claim, and in ancient times it indicated in a general way the ground which he would take. But the defendant's real defence in the modern sense, that is, his answer to the declaration, was contained in his plea, which came later.

Imparlance. Before making his defence, however, the defendant had in most cases the right to at least one *imparlance*, or *licentia loquendi*, that is, to have the case postponed for a short time in order that he might *imparl* or talk with the plaintiff and try to settle the dispute amicably. If the plaintiff had declared

Oyer. on a deed and made profert of it, the defendant before pleading could demand *oyer* of it, that is, to have it read to him, the effect of which was that the whole deed was thereby incorporated into the plaintiff's declaration, and the defendant could take advantage of any parts of it which were favorable to him and which the plaintiff had not mentioned. It was at this stage

Voucher. of the proceedings also that the defendant might in a proper case pray in aid, or vouch in another person who for any reason was bound to assist him in his defence, a case of whichh as already been mentioned in speaking of common recoveries.[9]

If none of these proceedings were taken by the defendant,

Plea. or after they were finished, the defendant put in his plea containing his answer to the declaration.

Course of pleading. **1045.** Under the common law system of pleading the parties were required to go on with their altercations until some proposition, either of fact or of law, which had been propounded on one side was denied on the other. The pleadings would thus present to the court a single clearly defined question for decision, on the decision of which the rights of the parties depended and

Issue. the whole case would turn. Such a controverted proposition was called an issue, *exitus*, because there the pleadings ended. If the defendant in his plea denied anything contained in the declaration, an issue would be reached at once. But if he did

Pleadings after the plea. not, then it became necessary for the plaintiff to reply to the plea; and if an issue was not raised by the reply, the defendant in turn had to rejoin. Sometimes farther pleadings were neces-

[9] See § 598.

r. The names of the successive pleadings were as follows, Names of pleadings.
ı party pleading alternately: declaration, plea, replication, inder, surrejoinder, rebutter, surrebutter. Beyond the sur-ıtter pleadings have never been carried.

A plea might, and still may, be a demurrer, a traverse or Classes of pleas.
lea in confession and avoidance.

A demurrer[10] is an objection or exception to the declaration Demurrer.
the ground that it is not sufficient in law, that the plaintiff his own showing has no cause of action against the defendant, that, admitting all the statements in the declaration to be ', it does not appear that the defendant has done the plaintiff wrong.

A traverse is a denial of some or all of the allegations in Traverse.
declaration.

A plea in confession and avoidance is one in which the Plea in confession and avoidance.
ɜndant admits or confesses the declaration to be true and to on its face sufficient in law, but avoids its effect by setting new facts not mentioned in it, which show that the plaintiff no cause of action. This is the only kind of plea which contain any new matter in addition to the matter alleged the declaration.

A demurrer gives rise to an issue of law, the question raised Issues raisd by pleas.
it being whether the facts stated in the declaration amount ı good cause of action, which is a question of law. A traverse es an issue of fact, whether some fact alleged really exists. A ı in confession and avoidance raises no issue, nothing asserted ɔne side having been as yet denied on the other; so that at com-ı law further pleadings were necessary. Each subsequent plead-was in like manner a demurrer, traverse or confession and idance, till finally an issue was raised by a demurrer or traverse.[11]

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10 From French *demurer* or *demorer;* because the defendant stops and ɜes to go further in his pleading, on the ground that the plaintiff has ɟed nothing against him calling for answer.

11 For example, suppose that the plaintiff sues the defendant for running him with his horse and carriage in the street, the declaration not ɟing that it was done intentionally or negligently: *i.e.* the action is breach of the duty in § 690, on the assumption that that is a peremptory . The defendant might make any one of the following defences.

Continuances.

1046. When the parties had once been got into court, the proceedings in ancient times were expeditious, and might even be finished in a single day. If for any reason the case lasted longer, it was necessary that it be continued or postponed to another fixed day by an order of the court; and so on from time to time until it was finished. If that was not done, and the parties were at any time permitted to leave the court "without a day" being fixed for their reappearance, the case was at an end. If this happened before the final judgment, the case was said to be discontinued. The same was the effect, if in issuing process to get the defendant into court each writ was not issued on the day of the return of the preceding writ; in fact a discontinuance occurred if at any stage in the suit any gap was left between any two consecutive proceedings without a continuance having been duly granted by the court.

Going without day.

Discontinuance.

Modification of the old procedure.

1047. In course of time the ancient procedure was much modified, the proceedings preliminary to the trial no longer taking place orally in open court but being conducted in writing in the clerk's office. Appearance was effected by simply entering a notice of appearance with the clerk, which made it possible to permit the plaintiff to enter an appearance for the defendant, as has been mentioned, if the latter refused to appear. The pleadings were put into writing and filed in the clerk's office. Preliminary proof by the plaintiff was no longer required, though the declara-

Appearance.

Written pleadings.

Substance of defence.	*Form of pleading.*
1. That intention or negligence is necessary to a breach of the duty; that since the declaration does not allege either of these, it does not appear from the declaration that the defendant has been guilty of any breach of duty.	Demurrer; raising the issue of law, whether intention or negligence is necessary.
2. That it was not the defendant but some one else who ran over the plaintiff.	Traverse; raising the issue of fact, whether the defendant did run over the plaintiff.
3. That even if intention or negligence is not necessary, the defendant's horse was running away with him when the injury happened and was out his control, so that it was a case of inevitable accident.	Confession and avoidance, alleging the new fact that the horse was running away and out of control; raising no issue.

continued to allege that the plaintiff had his deed ready Profert and suit.
ourt or had brought his suit, and the word suit came to
regarded as denoting the action itself, which is its modern
ning. If the defendant demanded *oyer* of the deed, a copy Oyer.
given him. The defendant's defence became a mere form,
o importance, expressed by a few words prefixed to his plea, Defence.
; the defendant "defends the force and injury when and
re it shall behoove him," and even this is now omitted.
arlances and continuances became for the most part merely Imparlances and continuances.
inal. After the defendant's appearance the plaintiff had
rtain time allowed by law to deliver his declaration, and
the defendant a farther time for his plea, and so on for
the other pleadings, and when the pleadings were finished
case was put upon a list of cases awaiting trial and tried
n reached, and these periods were covered by purely formal

To the last plea the plaintiff might reply:

Substance of replication.	*Form of pleading.*
That the facts set up in the plea ot amount to what the law con- s an inevitable accident, and efore are no excuse to the defen-	Demurrer; raising the issue of law, whether those facts did amount legally to inevitable accident.
That the defendant's horse was running away or out of his rol.	Traverse; raising the issue of fact, whether the horse was running away, etc.
That even if the running away ld ordinarily have made the occur- e an inevitable accident, it is not this case, because the defendant caused the horse to run away by negligent driving.	Confession and avoidance, alleging the new fact of the defendant's negligence; raising no issue.

To the last replication the defendant might rejoin:

Substance of rejoinder.	*Form of pleading.*
That the occurrence was none less an inevitable accident because at negligence.	Demurrer; raising the issue of law, whether the negligence legally made any difference.
That the defendant had not been igent.	Traverse; raising the issue of fact, whether defendant had been negligent.

Form of the record.

continuances entered in the clerk's record. But the record of the case continued to be made up in very nearly the ancient form, as if the parties had actually appeared in court and actual continuances had been granted, so that in order to understand even a modern common law record the ancient practice must be known. Sometimes, however, a continuance by an order of the court is still necessary, as where a case has been set down for hearing on a particular day and one party, not being ready, desires a postponement.

Actual continuances.

Trial of issues of law.

1048. When an issue of law was raised, it was argued by counsel before the court *in banc*, and decided by the court after the argument; there was no trial of the case in the strict technical sense.

Trial of issues of fact.

If however an issue of fact appeared on the pleadings, a trial was necessary to determine the question in dispute. In ancient times various modes of trial were in use, most of which are long since obsolete and need only be briefly mentioned. Besides trial by assize, which will be treated of in another place,[12] the common law modes of trial were as follows.

Trial by record.

1049. Trial by record was where a record was pleaded by either party as his ground of action or defence, for instance where the plaintiff sued to recover a debt due by recognizance, or the defendant pleaded a former recovery, that is, that the plaintiff had already once sued him and got judgment for the same cause of action, and the other party denied that any such record existed. The trial was by simply producing the record, or a certified copy of it if it was in another court, and showing it to the judge.

Trial by certificate.

In trial by certificate a certificate from some public officer within whose official cognizance the matter lay, was accepted by the court as decisive of certain facts. Thus the peculiar customs of the city of London might be tried by the certificate of the mayor and aldermen, transmitted and certified through the recorder; and many ecclesiastical questions when they happened to arise in a court of law, such as whether a man had been excommunicated, were triable by the bishop's certificate, which in

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[12] See § 1099.

cases was equivalent to the record of the ecclesiastical courts, gh technically not such, those courts not being courts of record ıe technical sense.

1050. Trial by inspection was allowed in a few cases when issue was as to the physical condition of a person or thing ble of being produced in court and examined by the judges, nstance whether a person was of full age or was an idiot. court in such cases might, however, call in other persons to t it in deciding, for instance physicians, or put the person elf upon oath, called an oath of *voire dire* or *veritatem* e, and question him. Trial by inspection. Oath of *voire dire*.

1051. Trial by the judgment of God had its origin in a stitious belief that God, if properly appealed to, would inter- on behalf of him who had right on his side and make right manifest. The methods by which the divine inter- ion was sought were as strange as the belief that pted men to seek it. They were the ordeal and what called wager of battle. The ordeal was used in criminal , and consisted in subjecting the accused to some physical which if he successfully underwent he was adjudged inno- ; for instance whether he could swallow a piece of bread or e of a certain size without choking, or whether after holding t iron in his hand or plunging his hand into boiling water wound healed promptly and properly. Trial by the judgment of God. Ordeal.

Wager of battle, *vadiatio duelli*, was used in some prose- as for felony and in civil cases on writs of right. It was emn duel fought in the presence of the court, in which it was sed that Providence would always give the victory to the party was in the right. A party might wage it in a criminal case rson or by his champion, but in a civil case only by champion, eason for which latter rule was said to be that, if the parties d it in person and either was killed, the suit would abate no judgment could be given. Henry II introduced a new of trial in real actions, by grand assize, which will be fter described, and trial by battle gradually became obsolete, t was not formally abolished till the reign of George III, in consequence of the defendant in such an action claiming al by battle, a statute was passed abolishing it. Wager of battle.

Wager of law.

1052. In trial by compurgation or wager of law, *vadiatio legis*,[13] the defendant was permitted to rebut the plaintiff's demand by his own oath, provided he could bring into court a certain number, usually eleven, of his neighbors, who were called compurgators, who would swear that they believed that he spoke the truth. The compurgators were not witnesses; they did not profess to have any knowledge about the matter in dispute, but simply swore to their confidence in the defendant's veracity. A defendant could wage his law only in actions of debt on simple contract where the plaintiff had voluntarily given credit to him or in detinue for the recovery of chattels voluntarily entrusted to him by the plaintiff, in which cases the plaintiff had himself, as it were, admitted that the defendant was a person to be trusted; not in cases where the debt or demand was established by a record or deed or had accrued without the plaintiff's consent, as where the debt was an obligation arising form the involuntary reception of a benefit, and *a fortiori* not when the action was for unliquidated damages for a forcible or fraudulent injury, nor ever against the King. Nor could an executor or administrator be admitted to wage his law when sued in his representative capacity for a debt of the decedent, because he had no personal knowledge. In later times compurgators were dispensed with, and wager of law was by the defendant's own oath. It was abolished in England in 1833 by statute, after having been long disused.

Compurgatore.

When wager of law was allowed.

Trial by party witnesses.

1053. Trial by party witnesses, *per testes*, was allowed only in a few cases. A party who had asserted or denied a fact was permitted to substantiate his affirmation or denial by producing a certain number of witnesses who would swear to its truth. The witnesses were not questioned, nor were witnesses allowed to be produced on the other side; but their simple oath that the fact was so was taken as decisive. They differed from compurgators in that they professed to have knowledge of the fact and swore to that directly, not merely to their belief in the party's veracity. This mode of trial early became obsolete.

[13] Both wager of battle and wager of law derived their names from the fact that the defendant gave a gage or pledge (*vadium*) to appear upon the day fixed and make the trial.

None of the above methods of trial, except perhaps trial by ord, ever, it is believed, obtained in the United States. American law.

1054. The mode of trial that came to be the regular and inary one in the courts of common law, both in civil and minal cases, is trial by jury, or as it is often called, by the ntry, *per pais*. The famous expression trial by ones peers ans, except in the case of a nobleman, trial by jury. Trial by jury.

A writ called a *venire facias* is issued to the sheriff, ordering ıe to summon a certain number of qualified persons to serve as ymen. He returns to the court a list of the names of the persons ımoned on a panel or slip of parchment or paper which is annexed the writ, from which the persons summoned are themselves led the panel. The common law practice was to issue a ıarate *venire* for each case, and the sheriff selected such persons he thought fit from the qualified inhabitants of the county. *Venire facias*. The panel. Common law practice in selecting jurors.

When a new trial was granted in an action, a *venire de vo* was issued to summon another jury; so that the expression to ınt a *venire de novo* meant the same as to order a new trial. *Venire de novo*.

the sheriff was interested in the case, so that it was not)per for him to be entrusted with the selection of the jurors, writ was directed to the coronor, or if he also was disqualified act, then to two indifferent persons appointed by the court, o were called elisors. The modern practice is to summon a gle large panel to serve for the entire term or for a part of it, m whom the jurors for each case are selected by lot. The)ice of the panel in some places is still made by the sheriff and others by special officers appointed for that purpose, usually led commissioners of jurors. In the latter case a list of all the ılified inhabitants of the county is prepared, and the panel)sen from it by lot, so that the lot is twice used, first in ecting the entire panel and then in selecting the jury for each ıe out of the panel, so as to obviate all chance of partiality. *Venire* to the coronor. To elisors. Modern practice.

For important cases a special or struck jury is sometimes lered. In that case the sheriff instead of selecting the panel nself attends before the prothonotary or some proper officer of court with his list of persons qualified to serve as jurors, and officer in the presence of the attorneys of both parties takes at ıdom the names of forty eight of them. From these each Struck jury

attorney strikes out twelve, and the remaining twenty four are returned as the panel.

Nisi prius record. The trial.

1055. In England when the trial is at *nisi prius*, a copy of the record of the case so far as it has gone, including the pleadings, is made and sent to the trial judge for his information. This is called the *nisi prius* record.

Drawing the jury.

The procedure on a jury trial is as follows. When the case is called for trial, the names of the panel are written upon separate slips of paper, put into a box and drawn out one by one at random, the first twelve drawn constituting the jury for that case unless challenged. The first juror drawn is usually made the foreman or presiding officer of the jury, or else the jury choose a foreman.

Challenges.

A challenge is an objection made by either party to the jury. It is either to the array or to the poll. The former is an

To the array.

objection to the whole panel on account of some irregularity or illegality in the manner of summoning it. If the panel is selected by the sheriff, the fact that he is an interested party, so that the *venire* ought not to have been directed to him but to the coronor or to elisors, is a good cause for such a challenges. Challenges

To the polls.

to the polls, *in capita*, are exceptions to particular jurors. Either party may challenge any number of jurymen for cause, that is, if in each instance he can show some good reason why the juryman ought to be rejected, such as that he is not by law qualified to serve upon a jury, that he is related to one of the parties or is interested in the case, or that he has some prejudice or bias or has already formed such a rooted opinion upon the matter in dispute as will be likely to prevent him from making an impartial

Difficulty in obtaining juries.

decision. In important criminal trials, where much public interest has been aroused or local or political interests are involved, there is often much difficulty in obtaining a fair and unbiassed jury. Sometimes the court finds it necessary to change the place of the trial to another county on this account. The mere fact that a

Preconceived opinion by a juror.

juryman has already some knowledge of the matter in dispute, or has even formed an opinion upon it, is not a sufficient reason for excluding him, if he declares and the court believes that his opinion is not so fixed that he can not decide the case fairly according to the evidence. As has often been said, in these days

wspapers a man who did not read the news of the day and not some sort of opinion on matters of public interest would bly be too stupid and unintelligent to be fit to serve on a at all. But in their desire to secure an impartial jury the s have gone a great way in excluding jurymen on the ground econceived opinion, sometimes too far. The court or either may put questions to a juryman for the purpose of finding whether any ground of objection to him exists, and if the so orders he may be sworn on the *voire dire*[14] before being ioned The court decides whether to accept or reject a jury- who is challenged. Besides challenges for cause, each party owed a certain member, usually in civil cases two, of peremp- challenges; that is, he may challenge two jurors without g any reasons for his objection, and jurymen so challenged be excluded. If any one of the persons drawn is excluded challenge, another name is drawn from the box. If by n of challenges or the failure of jurors to appear a full jury not be made up out of the panel, additional persons called men[15] are summoned; in trials at *nisi prius* they may be *de circumstantibus*, from among such qualified persons as en to be present. Sometimes the court will postpone the and order a new panel to be summoned. When twelve s have been secured, they are empanneled, that is, appointed to on that jury, and sworn to give a true verdict according to vidence, whence the name jury (*jurata*) and jurors (*juratores*). al jury regularly consists of twelve men; but if the court all the parties consent, the trial may proceed with a smaller ber. If when a trial is partly finished the parties for any n wish not to go on with it, a juror may be withdrawn by onsent of the court, which puts a stop to the trial.

Examination on the *voire dire*.

Peremptory challenges.

Talesmen.

Empaneling.

Jury of less than twelve.

1056. The counsel for the party having the affirmative of ssue, usually the plaintiff, first opens his case by an address e jury containing such explanations as he thinks necessary. hen adduces his evidence. After putting in all his evidence arty rests his case, *i.e.* announces that he has finished; and

Opening the case.

Evidence.

Resting.

See § 1050.

From Latin *tales*, because they must be such persons as are qualified ve on juries.

The adverse case. the other party then opens his case and produces his evidence. When he has rested, the former party may put in more evidence in Rebuttal. rebuttal of any new matter brought in by his opponent. The other party may in turn rebut, if any thing new is adduced against him.

Summing up. When the evidence is finished the counsel for the parties sum up the case in speeches to the jury, after which the judge delivers a charge to the jury, in which he instructs the jury as The charge to the jury. to the law applicable to the case and, if he thinks fit, comments upon the evidence. But he has no right in ordinary cases to direct, or even to advise, the jury how they shall decide, the decision of questions of fact being their own peculiar province. Directing a verdict. But if on any essential point, the decision of which must be decisive of the entire case, one party produces no evidence at all or the evidence of both sides agrees, so that there is no conflict upon the point, then the decision of the case becomes a matter of law for the court, and the judge, instead of leaving it to the jury, will direct a verdict to be entered for the party entitled to it. A case ought not to be left to the jury unless there is some disputed question of fact to be decided.

Formerly the same result, namely the withdrawal of the case Demurrer to evidence. from the jury and its decision by the judge, might be attained by a demurrer to the evidence. When one party had finished his evidence the adverse party might admit the truth of every thing that the other had attempted to prove by his evidence, but assert that the facts so proved were not in law sufficient to establish the other's contention, and request the court to decide in his favor as if his opponent had produced no evidence at all. This proceeding is now nearly obsolete.

The verdict. **1057.** If a verdict is not directed, the jury after receiving the judge's charge retire to some private place, to which no one but themselves must be admitted, and settle upon their verdict (*veredictum*) which must be unanimous. The jury in civil cases are bound to decide according to the preponderance of evidence; that is, it is not necessary that facts should be so fully proved as to remove all possibility of doubt. A fact is sufficiently proved for legal purposes when its existence is made more probable than its non-existence.[16] In ancient times the jury were to be kept locked up, without

[16] But see § 1260.

t, drink, fire or candle unless by permission of the judge, till agreed, and might even be carried around the circuit from e to place in a cart. But now they are usually treated severely, and in ordinary cases are allowed to go to their es when the court adjourns for the day; and even when this ot permitted, they are provided with such things as are neces- to their comfort during their detention, being usually sent to e hotel in charge of an officer. If they can not agree, the t will discharge them; in which case the whole trial goes for ing and the case must be tried again before another jury.

Disagreement of the jury.

If the jury agree, they return to the court and announce their ict by the mouth of their foreman. Either party, however, a right to have the jury polled, that is, to have each juryman d separately whether he agrees to the verdict. The verdict ther general or special. A general verdict in criminal cases is ly that the accused person is guilty or not guilty; in civil cases a verdict simply for the plaintiff or for the defendant, with a ment of the amount of damages, if damages are given. In a ial verdict the jury state at large such facts as they find to been proved, and leave it to the court to decide on those for which party judgment should be given. A verdict subject he opinion of the court on a special case is where the jury generally for the plaintiff, but add a special finding of in facts with a proviso that if on those facts the court thinks the verdict should be for the defendant, it may be so entered; , the court having passed upon the question, a general verdict tered for one party or the other, the special finding not g upon the record as an ordinary special verdict does.

Announcement of the verdict.

General verdict.

Special verdict.

Verdict subject to the opinion of the court.

1058. The history of what is done at the trial is added in land to the *nisi prius* record, and is sent back to the clerk he court to be by him inserted in the record of the case. This ry begins with the statement that "afterwards" the parties ared at the time and place of trial, from which it is known he *postea*. This is sent back by the hand of the successful y; so that to give the *postea* to a party means to decide in favor.

The *postea*.

1059. If at any time in the course of the trial the judge mits any error, for instance if he improperly accepts or rejects

Errors of the trial judge.

a juryman who is challenged or any evidence offered by either party, or if he charges the jury incorrectly, the party prejudiced by the erroneous ruling should at once except to it, that is, call the attention of the judge to it in order that he may have an opportunity to correct it, and declare that he excepts or objects to it. If he does not except, he is presumed to acquiesce in the ruling and can not afterwards complain of it. But a decision of the judge in a matter as to which he has a discretionary authority generally can not be excepted to or reviewed elsewhere, but is final, *e.g.* in most cases a refusal to grant a postponement of the trial at a party's request.

Exceptions.

What may be excepted to.

Proceedings between trial and judgment.

1060. After a trial the judgment could not at common law be entered until the following term. Between the verdict and the judgment, or at present in the United States even after judgment, the party against whom the verdict was given has an opportunity to make various motions, the effect of which if successful will be to prevent judgment against him. Such motions are of two classes, (1) for matters apparent upon the record, and (2) for matters *dehors* or extrinsic to the record.

Motion in arrest of judgment.

Of the first kind is a motion in arrest of judgment, which is an application to the court by the defendant after a verdict against him to arrest or stop the judgment that would regularly be entered for the plaintiff, on the ground that the declaration varied from the writ or that it was not sufficient in law. Such a motion can be made only for some defect in the declaration for which the defendant might have demurred to it in the first place. But as a defendant was formerly not allowed both to demur and plead, if he thought that he had a good defence both on the facts and the law, he would usually first plead, and then if beaten on his plea, resort to this motion. But such a motion will not avail for any mere defect of form, nor even for a defect of substance if that consisted merely in the omission to state some fact which the plaintiff actually proved at the trial and without the proof of which the verdict could not have been rendered. Such defects are said to be cured by the verdict. Also the party who moves in arrest, even if successful, must still pay costs, because he ought to have demurred in the first place and saved the expense of a trial.

Not for defects of form.

Costs.

A motion for judgment *non obstante veredicto* is very similar motion in arrest. It may be made where one party, attempt- n his pleading to confess and avoid his opponent's previous- ling, does not allege a matter sufficient to avoid it; in which even though the facts alleged by him are found by the jury) true and a verdict on the issue of their truth has been . in his favor, still he ought not to have judgment, because he confessed the truth of his adversary's previous allegations and set up nothing sufficient against them. Here too the plea nfession and avoidance ought rather to have been demurred

Judgment *non obstante veredicto.*

When by the mistake of the pleaders the issue has been d on some point which is wholly immaterial, so that even that point had been decided by the verdict the court can now for which party it ought to give judgment, as if, for nce, in an action against an executor on a contract made by estator he pleads that he himself made no such contract, a n for a repleader is proper, and the court will order the es to plead anew, beginning at the point where the mistake red.

Repleader.

A motion for a new trial is made for some cause that does appear upon the record, *e.g.* for some error committed by the at the trial to which the party making the motion duly ted at the trial or for misconduct of a juryman, or if the ct or the amount of damages awarded is so plainly wrong unsupported by the evidence as to raise a violent presumption the jury have been influenced by passion or prejudice or have into some serious error. If there is room for any reas- le doubt about the matter, the court will not grant a new merely because it thinks the verdict wrong; the error must oss and plain. Nor will a new trial be granted even for ubted error, if the court is satisfied that notwithstanding the substantial justice has been done. It may also be granted e ground of newly discovered material evidence which the could not by the use of due diligence have discovered in to use it on the trial.

New trial.

All these motions are made to the court in banc. If ground of the motion does not appear upon the record,

Practice on such motions

and is within the knowledge of the trial judge, as where it consists in a ruling by him or an alleged error in his charge to the jury, he makes a certificate stating the facts; if it is not within his knowleege, as in the case of misconduct of a juror in the jury room, the facts are presented in affidavits made by persons who have knowledge. On the motion being made the court makes a rule *nisi*, or a rule to show cause, *i.e.* a conditional order that the motion shall be granted unless (*nisi*) on a day fixed the other party shows cause why it should not be. On that day the parties' counsel appear before the court and argue the point, and the court either makes the rule absolute, *i.e.* makes an order granting the motion, or discharges the rule, *i.e.* denies the motion.

Rule *nisi*.

Rule made absolute or discharged.

Judgment.

1061. If the verdict is not set aside in some one of the ways above mentioned, judgment is given according to the verdict. But in some cases judgment may be given without a verdict. A discontinuance is where the plaintiff has failed to appear or take any necessary step in the suit at the proper time. A *retraxit* differs from a discontinuance in that it is the deliberate voluntary withdrawal of his suit by the plaintiff, whereas a discontinuance may be due to mere carelessness or accident. Under the old law it was necessary for the plaintiff to be present in court in person or by attorney when the verdict was announced, in order that he might answer for the amercement due from him to the king if he failed to maintain his case. If on being called he was not present, he was said to be nonsuited, and the case was dismissed. Therefore sometimes when he perceived that he had failed to prove his case he would intentionally stay away and permit himself to be called or nonsuited. The practice has been recently introduced by statute for the court to order a nonsuit as soon as the plaintiff has rested his case, without the defendant's putting in any evidence, when the court is satisfied that the plaintiff has so entirely failed to prove his case that a verdict for him if given would have to be set aside, in which case it would simply be a waste of time for the court to go on and hear the defendant's side of the case. A motion for a nonsuit has taken the place of the old demurrer to evidence. On a discontinuance, *retraxit* or nonsuit judgment is rendered for the defendant; but as no

Discontinuance.

Retraxit.

Nonsuit.

Voluntary nonsuit.

Ordering a nonsuit.

Judgment on discontinuance, *retraxit* or nonsuit.

ion has been made on the issue involved in the suit, that not become *res adjudica*, but the plaintiff is at liberty to ; another action for the same cause, so that such a judgment is unfavorable to the plaintiff than a judgment on the merits, which reason a plaintiff sometimes suffers a nonsuit voluntarily ı he finds that for some cause, *e.g* absence of his witnesses, an not succeed in his action but thinks that he might do r another time. If the defendant on his part omits to ar or do any act at the prope time, he is said to make ılt, and judgment is given against him by default. This nent, unlike one on a nonsuit, is conclusive, the defendant ; taken to have confessed the plaintiff's right; otherwise defendant might put off the plaintiff's recovery indefinitely epeated defaults. If a discontinuance, nonsuit or default is red by inadvertence or accident, the court on motion will lly open it and resucitate the case on just terms, and permit be tried.

Default.

Judgment on default.

Opening a nonsuit or default.

1062. A judgment may also be rendered against a party his own consent, in which case he is said to confess nent. Such a consent may be given by an agent or ney appointed for that purpose by a deed. A power of ney to confess judgment is called a *cognovit actionem*, or ly a *cognovit*. It is a very common form of security for ebt. The debtor appoints the creditor his attorney to ss judgment against him for the amount of the debt if ; not paid when it falls due, by which the delay and nse of a suit is avoided. If the creditor makes an improper of the *cognovit*, the court on the motion of the debtor will e the judgment or stay, *i.e.* stop or forbid, its enforce-, and may even punish the creditor as for a contempt of

Confession of judgment.

Cognovit.

1063. Judgments are either interlocutory or final. A final nent is one which, unless it is reversed upon appeal or set on motion, finally determines and disposes of the entire n. This is the ordinary kind of judgment. An interlocutory nent is one that is given at an earlier stage in the action, ing some particular question, but leaving further proceedings to be had for a full disposal of the case. Thus a judgment

Final judgment.

Interlocutory judgment.

in an action of account that the defendant do account, after which the account is to be taken before auditors, is an interlocutory judgment, so is a judgment for the plaintiff on a demurrer in an action for unliquidated damages, the amount of the damages not yet being known.

Assessment of damages.

When after an interlocutory judgment the amount of damages remains to be ascertained, this may be done by the court

Inquest.

itself with the assistance of a jury, or in some of the United States without a jury, in the form of an ordinary trial, which is called an inquest or hearing in damages. But in most places the court will not take the time to do this; and the

Writ of *ad quod damnum*.

usual practice is to issue a writ of inquiry, or *ad quod damnum*, directed to the sheriff, ordering him to summon a jury, inquire into the amount of damages and report them to the court A trial on the question of damages is then had before the sheriff's jury, the sheriff or his deputy presid-

Damages on default.

ing in place of the judge. When the defendant makes default it is also often necessary before entering any judgment to take an inquest or issue a writ of injury to ascertain the amount of the damages. By his default the defendant admits that the plaintiff has a cause of action against him and is entitled to recover some damages, but not the amount of the damages.

Docketing judgments.

A judgment when entered is docketed, that is, an abstract of it is entered in a book called a docket, and it then become a lien on land as already described.[17] The re-

Judgment roll.

cord of the whole case, including the final judgment, is often called the judgment roll. It is written out or enrolled by the clerk, formerly on parchment, after the entry of the judgment from memoranda kept by him during the proceedings, and the roll is preserved in the archives of the court. At common law it could not afterwards be altered or amended.

Costs.

1064. By various statutes ancient and modern the successful party is entitled to recover from the other the costs of the suit, which are inserted in the judgment. These are certain allowances

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17 See § 553.

money to defray the expenses of the suit. They are usually
d by statute, but are sometimes to some extent left to the
retion of the court. The successful party makes up a bill of
s, and if the parties can not agree upon the items and amounts,
s taxed or settled by the clerk, or by a judge if the clerk's
ation is unsatisfactory to either party.

1065. Appeals in the proper sense were unknown to the Appeals.
mon law; but there were certain proceedings partaking more
less of the nature of appeals.

A writ of deceit was a proceeding formerly in use in the Writ of deceit
rt of Common Pleas, but now abolished, to reverse a judg-
nt for the possession of lands or tenements obtained by fraud
deceit.

A writ of *audita querela* lay where after the judgment *Audita querela*
ie new fact had arisen by reason of which the judgment ought
to be enforced, though it still stood undischarged of record;
instance if the parties had made an accord and satisfaction.
e writ, which was an original writ from Chancery, was directed
the court that rendered the judgment. It stated that the
plaint of the defendant had been heard, and then, setting
the matter of the complaint, ordered the court to summon
parties before it, and having heard their allegations and
plaints, to cause justice to be done between them. If sufficient
unds for so doing appeared, the court would order the judgment
be discharged of record. But at present the relief can gene-
y be given by the court upon a mere motion, so that this
t has fallen into disuse.

1066. A writ of error is the general common law method Writ of error
reversing erroneous judgments. It lies only to correct errors of
; a wrong decision on a question of fact, *e.g.* an incorrect verdict,
erally can not be corrected at all, except by granting a new
l as has been explained, the law considering that an appeal
n one jury to another jury would be futile, the second jury
ng no more likely to decide correctly than the first. The writ Errors apparent upon the record.
for errors apparent upon the record, and in ancient times could
had for any error, even for a mere mistake of the clerk in
king up the record, the law not permitting a record to be altered
en once made up and enrolled. But in modern times such

mistakes are amendable on motion by order of the court, and writs of error are confined to cases of actual error in the court's decisions. A proceeding in error is in form a new action begun in the higher court by the party against whom the judgment has been rendered below, who is called the plaintiff in error. It is begun by an original writ, directed to the judges of the court that rendered the judgment complained of, commanding them to send the record to the higher court for the purpose of having the error corrected. To this writ the judges make a return containing a complete copy of the record, and send this with the writ to the higher court. The other party, called the defendant in error,[18] is then summoned to appear in the higher court and hear read the record. The plaintiff in error makes a declaration in error, which however differs from an ordinary declaration in containing not a statement of facts but an assignment of errors, that is a specification of the points in which the error is alleged to consist, which must appear upon the record itself. The defendant pleads that there was no error. Thus there is raised an issue of law, after hearing argument on which the court gives judgment affirming or reversing the judgment of the court below.

Procedure in error.

Errors not apparent on the record.

1067. But there are many errors which may be committed by the court below which would not regularly appear upon the record. Such are most erroneous decisions of the judge on a trial with a jury. The record of the trial contains only the date and place of the trial and the verdict; it does not contain the evidence, the rulings of the court at the trial nor the judge's charge to the jury. To enable these errors to be reached and corrected by a writ of error, the party prejudiced by the erroneous decision, if he duly excepted to it at the time, is permitted to prepare a bill of exceptions, containing his exceptions and so much of the history of the trial and the evidence as is necessary to explain the exceptions, which bill having been allowed, that is, certified to be a true account of what took place, and

Bill of exceptions.

[18] If the writ of error is brought by the defendant below, the names of the parties below will be reversed in the title of the proceedings in error, thus the case of Smith *vs.* Jones in the court below will become Jones *vs.* Smith in error.

led by the judge, is annexed to the record and sent up with
o the higher court on the writ of error. Thus by means of
rit of error any decision upon a point of law made by the
rt at any stage of the action can be brought for review
ore the appellate court.

Writ of error coram nobis.

1068. There is also another writ of error to reverse a
gment on some ground of fact not appearing upon the record
l not embraced in the issue passed upon by the jury, but
se existence makes the judgment voidable, as for instance if
defendant, being an infant, has appeared by his attorney
ead of by his guardian. This writ is brought in the same
rt that rendered the judgment, because, the fact never having
n brought to the attention of the court before, and not hav-
been passed upon by it, that court has been guilty of no
r, so that there was no inconsistency in asking it to reverse
own judgment. This writ was called a writ of error *coram*
is in the King's Bench, or *coram vobis* in the Common Pleas,
ause the record is stated to remain before us (the King) or
ore you (the judges) and is not removed to a higher court.

Certiorari.

1069. A judgment of a court not of record can not be
iewed upon a technical writ of error, because there is no
rd to be sent up. But a writ of false judgment or in later
es of *certiorari*,[19] was used with the same practical effect.

Execution.

1070. A judgment of a court of common law is enforced
a writ of execution. This is a judicial writ, or final process,
cted to the sheriff and commanding him to carry the judg-
nt into effect. It is issued by the clerk of course, without any
cial order of the court. But after the lapse of a certain time
n the rendition of the judgment an order of the court is
essary, because it is supposed that a judgment which has been
ered to lie for a long time unenforced may have been in some
satisfied. This period is usually from three to five years.
judgment creditor must then, if he wishes for execution, take
a writ of *scire facias* or some equivalent process, ordering
judgment debtor to show cause why an execution should not
issued. If no reason to the contrary is shown, the court will
nt the execution. This is called reviving the judgment.

Revival of judgment.

[19] See § 935.

The most important kinds of executions are the following.

Habere facias. **1071.** A judgment for the recovery of land is enforced by a writ of *habere facias seizinam* or *habere facias possessionem*, accordingly as the estate recovered by the plaintiff is freehold or not, under which the sheriff, by force if necessary, expels the intruder and puts the plaintiff into possession of the land.

Capias ad satisficiendum. **1072.** On a judgment for money only, if it is a case where imprisonment of the defendant is permitted and in which the *mesne* process might have been a *capias ad respondendum* or some equivalent writ, a writ of *capias ad satisficiendum* (*ca. sa.*) is available as final process, under which writ the defendant is arrested and imprisoned till he pays the judgment. This was regarded as the ultimate remedy of the law, so that if the defendant were once taken in execution under it no execution could afterwards be issued against his property, and if the plaintiff once released him from prison he could not afterwards arrest him again. But by statute in later times execution against the defendant's property may be had in some cases, if the imprisonment fails to coerce the defendant into paying. A *Jail limits.* certain district is marked off around the jail, known as the jail limits. If a debtor imprisoned on civil process gives security to the sheriff never to go out of the limits, he may be permitted to live there instead of being actually confined in the jail. If he does go out of the limits, the sheriff is responsible *Release of debtor.* as for an escape. By the old law a person might be imprisoned for life if unable to pay a judgment obtained against him. But in modern times this came to be thought cruel, and provision has been made by statute for his release, either by his going through bankruptcy, giving up all his property to his creditors, or by taking the "poor debtor's oath" that he has no property available to pay the debt. In some of the United States the period for which a judgment debtor can be held in prison is absolutely limited by statute. If he is freed from prison without payment in any manner except by the consent of the creditor, the debt is not discharged. If the defendant has given bail *Liability of bail.* to the action, and the sheriff can not find him to arrest him on the *ca. sa.*, and returns *non est inventus*, his bail are responsible for the debt unless they produce him, and may be com-

lled by an action of debt on the bail bond or by a writ of *re facias* to pay the judgment.

A *ca. sa.* or any execution for money may also be had ainst a plaintiff against whom a judgment has been given costs. Execution for costs.

1073. A *fieri facias* (*fi. fa.*) is an execution command- ; the sheriff to cause to be made out of the goods and attels of the defendant the amount of the judgment. The ect of this in creating a lien has already been mentioned. ider this writ the sheriff seizes goods and chattels or chattels il of the defendant and, having first advertised them for the ne and in the manner prescribed by law, sells enough of them auction to pay the judgment and the costs of the execution. rtain property is exempt from execution. This generally in- des necessary food, clothing, fuel and household furniture of e debtor and his family, the tools of the debtor's trade, and most places some other things. If the *fi. fa.* is returned olly or partly unsatisfied, subsequent writs of execution may had. *Fieri facias.* Property exempt from execution.

1074. Another species of execution is a *levari facias*, der which the sheriff levies upon or seizes the goods of the btor and the profits of his lands until the judgment is isfied. A writ of *elegit* is another kind of execution, which s already been described.[20] *Levari facias.* *Elegit.*

1075. On debts by statute merchant and statute staple[21] l in some other cases by statute, an extent, or *extendi facias*, allowed. The sheriff arrests the defendant and imprisons n as on a *ca. sa.*, and also seizes his goods and all his land, s them appraised at their full or extended value, and delivers m to the plaintiff, the goods absolutely, the land till the ts and profits have paid so much of the debt as the goods not pay. Extent.

1076. At common law freehold land could not, for feudal sons, be taken from the tenant to satisfy a money judgment inst him; only the temporary possession or the rents and fits could be taken as above described. But in the United Executions against land.

[20] See § 545.

[21] See § 545.

States it has always been allowed to take the land itself, either under one of the above mentioned writs or under what was called simply a writ of execution having no specific name. The land was either sold, or appraised and enough of it set off to the plaintiff to satisfy his claim, the practice being different in different states.

Expenses of levy.

1077. Under all kinds of executions the expenses of the levy, including the sheriff's fees, and those of the jailor if the defendant is arrested, the expenses of appraisal and sale and the care of the property while in the sheriff's hands, are to be added to the judgment, the plaintiff being in the first instance responsible for them to the sheriff. Interest is also payable on the judgment from the date of its rendition.

Interest on judgments.

Rules of court.

1078. The expression rule of court has two meanings. (1) A rule in the ordinary sense, a general regulation made by the court as to the conduct of business before it. Every court has authority to make such rules. (2) A specific order of the court made in the course of an action or other proceeding, *e.g.* a rule *nisi* on a motion for a new trial.[22] A motion is a request to the court to make such an order or rule or to do some act. If the facts on which the motion is based are not within the knowledge of the court or apparent from the record, it is generally necessary for the party making the motion to prepare affidavits[23] showing the facts. The party against whom the motion is made may also present affidavits. If the affidavits conflict, the court may decide the controverted point on the affidavits themselves, or, if not satisfied which statement is true, may call witnesses or appoint a referee to examine the matter and report the facts to the court, or may even order a trial by jury, though that is very seldom done. Unless the necessity for the motion arises suddenly while the parties are before the court, as for instance in the case of a motion made when a case is called for trial to postpone the trial because a witness who has been summoned has failed to appear, it is usually necessary to give notice to the adverse party beforehand of the time and place of the motion, because generally both parties have a right to be heard before an order is made.

Motions.

Questions of fact on motions.

Notice of motion.

[22] See § 1060. [23] See § 1098.

etimes instead of the moving party himself giving such notice, Order to show cause.
court or a judge makes an order that the adverse party appear
re the court on a certain day and show cause why the motion
ld not be granted, as was done at common law on a motion
a new trial. There are some orders, however, which are
ted *ex parte*, that is, without any notice to the adverse *Ex parte* orders.
y; but in such case the latter party always has a right to
e the court to vacate the order, which latter motion is made
notice and a hearing is had.

CHAPTER LXIX.

PLEADING AND EVIDENCE.

Counts

1079. After the introduction of written pleadings the science or art of pleading was elaborated and systematized. If the plaintiff has more than one cause of action against the defendant proper to be prosecuted under the same writ, that is, in the same form of action, for instance two separate debts or two trespasses, he may if he chooses include them all in the same action instead of being obliged to bring separate actions for them. In that case he inserts a separate count or statement in his declaration for each cause of action. From this arose the practice of stating the same cause of action in various ways in different counts, so that if the plaintiff fails in the proof of one he may succeed upon another. For instance in an action for the price of goods sold the plaintiff might allege in one count that the defendant bought goods of him for the agreed price of £20, and then, if he was not sure of being able to prove any agreement as to price, he might add another count alleging that the defendant bought other goods (referring in fact to the same goods, but describing them as others so as to appear to be suing for a different debt) and agreed to pay for them as much as they were reasonably worth, *quantum valebant*, and that they were reasonably worth £20. Counts in *indebitatus assumpsit* for goods sold, work and labor, money paid, money had and received and account stated,[1] being of very frequent use and often combined in one declaration, are known in the United States as the common counts in *assumpsit* or simply as the common counts.

Several counts for the same cause of action.

The common counts in *assumpsit*.

General demurrer.

1080. A demurrer is either general or special. A general demurrer is used when the declaration is bad in substance. It consists of a general statement that the declaration is not sufficient in law and a request for judgment upon it. When the defect in the declaration is merely formal, as for instance at common law when it did not mention the time or place of the com-

Special demurrer.

[1] See § 927.

ı of the wrong although showing that a wrong had been
tted, the demurrer must be special, pointing out the exact
in the declaration on which the defendant relies. The
of a demurrer is merely to indicate defects in the declara-
t must not contain any statements of additional facts or
nial of any of the plaintiff's allegations. By demurring the Admission by demurrer.
ant admits for the purposes of the action that all the material
ents in the declaration are true, but this does not prevent
om disputing them in another action
ıg, called a joinder in demurrer, which simply asserts that Joinder in demurrer.
laration is sufficient. Thus an issue of law is reached be- Issue of law.
the parties, a proposition, namely, that the declaration
cient, affirmed on one side and denied on the other.

081. If the defendant does not demur, he must plead. A Dilatory pleas.
either a dilatory plea or a plea in bar. A dilatory plea is one
does not answer the allegations in the declaration, but shows
eason why the suit ought not to go on. It is so called because
a decision upon the real merits of the case is delayed. Such
re of three kinds: (1) pleas to the jurisdiction, showing that To the jurisdiction.
urt has no jurisdiction over the action, so that it is unneces-
r the defendant to answer the declaration, as where the
has been brought in the wrong court; (2) pleas to the dis- or disability.
of the plaintiff, showing that the plaintiff has no right to
where he is an outlaw or a fictitious person; and (3)
n abatement, which are either to the writ or to the declara- In abatement.
howing some fatal defect in one of them which does not
upon its face, otherwise a demurrer would be the proper
ıg, but needs to be alleged by the defendant, as in case
isnomer, where the name of a party is wrongly stated, or
ıe plaintiff is dead or that the writ has not been properly
upon the defendant. All dilatory pleas are sometimes called
n abatement, but not with strict technical propriety.
rmerly if a dilatory plea was successful, the suit was dis- Effect of a dilatory plea.
but at present the plaintiff is allowed to amend his
f it is one capable of being amended, such as a mere
ıer. But such a dismissal does not prevent the plaintiff
uing again, the real controversy not having been decided.

Respondeat ouster. If the plea is overruled, an interlocutory judgment is rendered, that the defendant answer over, *respondeat ouster;* and he then has to put in a plea in bar.

Plea in bar. **1082.** This latter sort of plea, also called a plea to the action or to the merits, may be either a traverse or a plea in General issue. confession and avoidance. What is called the general issue is a traverse in a certain set form of the whole or a considerable Special traverse. part of the declaration. A special traverse is where the defendant selects some one particular allegation in the declaration and denies it *verbatim*. A traverse concludes with the words; "and of this the defendant puts himself upon the country," the meaning of which is that the defendant askes for a trial by Joinder of issue. jury.[2] A short formal pleading by the plaintiff, called a joinder of issue or a *similiter*, declaring that the plaintiff does the same, *i.e*, demands a jury trial, concludes the pleadings.

Forms of general issue. **1083.** In each of the common law forms of action there is a particular form of the general issue.[3] In real actions the general Real actions. issue was *nul tort* or *nul disseizin*, or on writs of right that the tenant had a better right to the land than the demandant. In personal actions the forms are as follows.

Action on a record. In an action upon a record, for instance an action of debt on a judgment or recognizance, the general issue is *nul tiel record*, that no such record exists as the plaintiff has alleged.

Action on a deed. In debt on a bond or in covenant the form is *non est factum*, under which the defendant can set up the defence that he never in fact executed any such deed or that the deed is utterly void, and not merely voidable. If the defendant wishes to assert that the deed is voidable, as for fraud, or that the debt has been paid, he can not make these defences under the general issue, but must put in a special plea of fraud or payment.

Debt on simple contract. In debt on a simple contract the general issue is *nil debet* or *non detinet*, accordingly as the action is brought in the *debet* or in the *detinet*, under which, because of its generality, the

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[2] See § 160.

[3] The old French and Latin names given here are those by which these pleas are usually referred to. They are the words which express the essential point of the plea.

ant may prove any facts showing that he is not indebted plaintiff, even the payment of the debt; so that in this it was rare that any other plea was used. It was under these pleas only that the defendant could formerly wage his hich amounted to simply swearing to the truth of his plea.

Detinue.

detinue the defendant may plead *non detinet*, which not that he is not in fact detaining the property in n, but that he is not wrongfully detaining it, so that a has the same generality as in debt.

Account.

account the form of the general issue is that the defendant ly accounted.

Replevin.

replevin the plea is *non cepit*, which is limited in its to a denial of the actual taking and does not admit of hat the taking was justifiable.

Trespass and case.

trespass, including ejectment, and in trespass on the case, ig trover, "not guilty" is the general issue, which is very wide plea, but does not extend to matters of justi-

Assumpsit.

assumpsit the general issue is *non assumpsit*. This ial *assumpsit* amounts only to a denial of having made ch contract as the plaintiff has alleged. Under it, however, fendant may show that, although he promised, there was sideration for the promise, so that it did not amount to a contract. But in *indebitatus assumpsit*, where the con- purely fictitious, implied from the existence of a debt, the *non assumpsit* denies the debt, and thus has the same as a plea of *nil debet*.

Indebitatus assumpsit.

Statutory changes.

cause of the generality of some of those pleas, the plain- many cases can not tell what ground of defence the ant really intends to rely upon, and is liable to be surprised at the trial. This has led to the enactment of modern statutes limiting the scope of the pleas of *nil non detinet*, not guilty and *non assumpsit* to matters are actually inconsistent with the truth of the declara- compelling a defendant to file with his plea a notice ng his actual grounds of defence.

Plea in confession and avoidance.

84. If however the defendant can not deny the truth declaration, but intends to rest his defence upon other

facts not mentioned in it, he must put in a plea in confession and avoidance. Such a plea ends with a formal offer by the defendant to verify or prove the facts alleged in it. Special traverses and pleas in confession and avoidance are known, in contradistinction to the general issue, as special pleas.

Special pleas.

Particular special pleas.

1085. There are a few kinds of special pleas which, though falling under one or the other of the two great classes of traverses or pleas in confession and avoidance, are in some respects peculiar and call for mention.

Estoppel.

If in his declaration the plaintiff has alleged any fact which he is in any manner estopped to assert, it is not enough for the defendant simply to deny the allegation. If he does so, the plaintiff is still permitted to prove its truth if he can. It is therefore necessary for the defendant to put in a special plea of estoppel, stating explicitly the facts which have created the estoppel.

Justification.

A justification is a plea which admits the act charged, but states facts showing that it was not unlawful, as in an action for slander that the derogatory words were true. This includes the two pleas next to be mentioned.

Liberum tenementum.

A plea of *liberum tenementum* is used in an action for an injury to land. The defendant, if such is the fact, pleads that the land in question was "his own close, soil, and freehold," and that therefore he had a right to do the acts complained of.

Son assault demesne.

A plea of *son assault demesne* is a plea of self defence in an action for an assault or battery; that the original assault was on the plaintiff's part and the defendant merely defended himself.

Set off.

A set off or counterclaim is where the defendant has an independent cause of action against the plaintiff, of the same nature as the plaintiff's claim, for which he might have had an independent action against the plaintiff, but which, to save the trouble of another action, he sets up in the plaintiff's suit. Thus if the plaintiff sues for a debt of $1,000, and at the same time owes the defendant $600 on another account, the defendant can set off the latter sum, and the plaintiff will get judgment for $400 only. Set off was not permitted at common law, but the defendant in such a case could go into

t of equity, which would ascertain the amount due the ff and injoin him from proceeding at law for any larger But in modern times by statute courts of law can allow claims. Set off is different from recoupment. The former s of an independant claim; the latter is where the defen- eeks to reduce or defeat the plaintiff's recovery by reason e fact or circumstance connected with the transaction itself which the plaintiff's claim arose; as for instance, where uit by the plaintiff for the price of work done by him for fendant the defendant asserts that the work was so badly s to be of no value. Set off in equity. Recoupment.

086. By the common law only one ground of action could tained in a single count of the declaration, and only one e could be set up to it. The defendant could not both demur ead; and if he pleaded, he could put in only one plea, and ust contain only one ground of defence. The non-observ- f this rule constituted duplicity in pleading, and made the g bad. But the defendant might make different answers to t parts of the plaintiff's claim; for example if the plain- d for £1000, the defendant might plead payment as to and a release as to the remainder; and if the declaration ed more than one count, the defendant was allowed put ingle plea to all the counts or to plead to them separately option. However in modern times the defendant is per- to make as many different pleas as he chooses, and the pleas need not be consistent with each other; *e.g.* he oth traverse and confess and avoid the same allegations in claration. And if he demurs unsuccessfully, he can always leav of the court to plead over, *i.e.* to plead again. Duplicity. Pleas to different counts. Modern rule. Pleading over.

087. There are two kinds of replications which have special A new assignment is where the defendant has mistaken aintiff's cause of action and has put in a plea applicable ifferent matter. The plaintiff then has to new assign, *i.e.* his cause of action more particularly, so that the replication es practically a new or amended declaration, to which the ant's rejoinder is in the nature of a plea, and is subject same rules as pleas in bar, *e.g.* the defendant may plead neral issue, although ordinarily in any pleading after the Particular replications. New assignment.

plea a traverse can only be special. For example, if the defendant has committed two assaults upon the plaintiff, for one of which he has settled and made compensation, and the plaintiff sues him for the other, then if the defendant pleads the settlement, the plaintiff in his replication should reassign and show more clearly that the suit is for the second assault and not for the first.

De injuria. The replication *de injuria* is a reply to a plea of justification. The plaintiff asserts that the defendant did the act complained of "of his own wrong" and without the justification alleged in the plea.

Duplicity. **1088.** The rules as to duplicity above mentioned apply to all pleadings subsequent to the plea; and as to these latter there is another equally important principle known as the rule Departure. against departure. A departure in pleading means that the pleader abandons the ground of action or defence which he has assumed in a previous pleading and takes up a new one. Thus if the plaintiff has sued the defendant for a false imprisonment and the defendant has pleaded in justification that the arrest of the plaintiff was under a warrant from a court, it would be a departure for the plaintiff to reply that the defendant procured the issue of the warrant maliciously and without probable cause, thus transforming his action from one for false imprisonment into one for a malicious prosecution.

Plea *puis darrein continuance.* **1089.** If after the defendant has pleaded some new fact arises which did not exist at the time of the plea, and of which he desires to avail himself in his defence, *e.g.* if the plaintiff has given him a release, he is permitted, provided he does so by the day set for his next appearance, *i.e.* the next day to which the case has been actually or formally continued, to set up the new matter in a substituted plea known as a plea *puis darrein continuance.* But if he delays beyond that day to do so, he is held guilty of *laches* or neglect, and must stand upon his original plea.

Pleadings in replevin. **1090.** In replevin if the defendant admits the taking of the chattel which the plaintiff has replevied, but asserts that it was justifiable, instead of a plea he puts in a pleading called Avowry an avowry, or if he has taken the goods as agent or servant of another person and justifies under the latter's right, a cogniz-

in which he confesses or avows the taking, states facts
ıg that he had a right to the chattel and demands its
ıtion to him. This is equivalent to a declaration, and
or a plea on the plaintiff's part, after which the pleadings
the usual form.

091. Anciently any mistake or even informality or irreg- Amendments and *jeofails.*
in the writ, process or pleadings was fatal to the party's
But later various statutes were enacted, known as the
ıs of amendments and jeofails,[4] which have authorized the
to permit errors in any part of the proceedings to be amended
ıh terms as are just. Under these statutes, if the mistake
correction has caused any delay, inconvenience or expense
adverse party, the court will usually impose costs on the
seeking to amend.

092. Evidence is of three kinds namely, (1) oral evidence, Evidence.
is the most common sort and consists of the testimony Oral.
nesses; (2) documentary evidence, consisting of written docu- Documentary.
, as where in an action upon a written contract the instrument
is produced in court; and, (3) real evidence, which is some Real.
brought into court for the jury to examine, such as a model
nachine in a suit for the infringement of a patent. The
evidence is also used to denote a fact from which another Probative facts.
ın be inferred.[5] There are in most kinds of cases no rules
the amount of evidence or the number of witnesses re- Amount of evidence.
to prove any fact. Any evidence which actually convinces
iers is sufficient. But when a fact is directly testified to by
ıterested witness, whose credibility is not impeached in any
and no contradictory evidence is offered, the triers are
to take that fact as proved.

093. Formerly a party to a proceeding, the husband or Persons not permitted to be witnesses.
f a party, any person having any pecuniary interest in the
of the proceeding or a person who did not believe in the
ıce of God or of a future life could not be a witness, because
persons were thought to be under too strong a temptation
tify falsely or not to be sufficiently sensible of the obligation

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From the words *jeo faile*, in which, when pleadings were oral, the
acknowledged that he had made an error.
See § 228.

of an oath. But these disabilities have all been abrogated by statute, except that a husband or wife can not be compelled to be a witness against the other. A communication made in confidence between husband and wife or between a man and his legal adviser relating to the client's affairs, and in some places between a man and a clergyman acting as his spiritual adviser or his physician, is called a privileged communication,[6] and the party to whom it is made can not be compelled and is not permitted, without the consent of the party making it, to disclose it on the witness stand. Thus if a man in order to obtain legal advice confesses to his lawyer that he has committed a crime, the lawyer may not reveal it; but a disclosure to a lawyer for the purpose of obtaining advice as to how to commit a future crime or fraud is not privileged.

Privileged communications.

Hearsay.

1094. A witness generally is only permitted to testify to facts which he knows "of his own knowledge," that is by the direct testimony of his own senses.[7] He may not repeat what has been merely told to him by others, which is called hearsay. This rule holds even though the person who originally made the statement is dead or out of the jurisdiction of the court and can not be called as a witness. Thus if the question were as to the former location of a stone or tree which marked the boundary line between two pieces of land but had since been removed, a witness could not testify what had been told him by an aged man, now dead, who saw it. But any confession or admission made by a party to a suit or a person whose successor he is about the matter in dispute may be proved, and there are a few exceptions to the rule against hearsay. Also a witness is allowed only to state facts, not his own opinions or inferences from facts. It is the province of the triers, not of the witness, to draw proper inferences from the facts proved. Thus if the question were whether a person was insane at a certain time, a witness might tell how the person acted, but would not be permitted to testify directly that he was crazy. But in matters requiring special skill or knowledge experts may give their opinions;

Confessions and admissions.

Opinions.

Experts.

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[6] For another meaning of privileged communications see § 730.

[7] See § 287.

istance a physician might properly say that a person was
e, or a civil engineer that a bridge was properly built.

The party who calls a witness examines him first, which is called direct examination or examination in chief. The other party then cross examine him; and afterwards a re-direct or re-cross ination is permitted if the parties desire it. The judge, or a an with the consent of the court, may also put questions witness. If any improper question is put to a witness, that y question the answer to which involves a statement which witness ought not to make, the other party should at once . If an improper answer is given to a proper question, ould object to the answer and request the judge to strike from the evidence and instruct the jury to disregard it. e judge admits improper evidence or rejects proper evidence, arty prejudiced thereby should promptly except to the judge's . If he omits to except he is deemed to consent. An eous decision by the judge, if duly excepted to, is a ground motion for a new trial or for a writ of error.

Direct and cross examination.

Objections to evidence.

Error of judge.

1095. The contents of a written document can be proved by the production of the document itself in court, which led primary evidence, unless the document is shown to be or destroyed, or is in the possession of the adverse party refuses to produce it after having been duly notified to do r is a public record, or a notice, in which cases other nce, or as it is called, secondary evidence, of its contents be given. This rule and the rule against hearsay are led under the principle that only the best evidence is to sorted to.

Proof of documents.

Secondary evidence.

Best evidence.

1096. The proper means of procuring the attendance of ness is by a writ called a writ of *subpoena* issued from ourt directed to the witness, commanding him under a penalty d in the writ to appear and testify. If the witness has ients in his possession which are needed at the trial, a writ *bpoena duces tecum* is used, commanding him to bring the ients with him to the court. If the witness disobeys the *ena*, the court will grant a writ of attachment against him, ng the sheriff to arrest him and bring him into court, and is being brought in the court will impose a fine upon him

Subpoena.

Subpoena duces tecum.

Attachment.

for his contempt of court in not obeying the first writ, unless he shows some good excuse. An adverse party may be summoned as a witness, and a writ of *subpœna duces tecum* issued to him to make him bring in documents. But the more usual way is to give him notice a reasonable time beforehand to produce the documents, and then if he does not do so, secondary evidence of their contents may be given; or under the modern practice the court will make an order on motion before the trial requiring a party to permit the other party to inspect documents and take copies of them.

Subpœna to adverse party.

Notice to produce documents.

Inspection of documents.

Commission to take testimony.

1097. If a witness is out of the jurisdiction of the court or is very old or sick, or if he lives at a great distance from the place of trial, the court will issue a writ known as a commission or *dedimus potestatem*, directed to some proper person as commissioner, authorizing him to take the testimony of the witness, reduce it to writing and return it to the court to be used upon the trial. Such a written statement of a witness's testimony is called a deposition and the witness a deponent. In certain cases, when the witness is in a foreign country, the court instead of a commission will issue letters rogatory directed to a court of that country requesting the court to take the depositions. In some places a party is permitted to take depositions without any writ or order from the court, simply on giving notice to the other party of the time and place of taking them and the person before whom they are to be taken, who must be some public officer designated by law for that purpose. Or the parties may consent to have depositions taken without any writ or notice. When depositions are to be taken, the party taking them sometimes prepares written questions or interrogatories to be put to the witnesses. These are submitted to the adverse party, who prepares cross-interrogatories on his part. The interrogatories are attached to the commission, and the witness is examined by the commissioner on the written interrogatories secretly in the absence of the parties, so that the parties do not know what the witness has testified till the deposition has been returned to the court and there opened. But sometimes the parties or their counsel attend before the commissioner and put questions to the witness *viva voce* as on a trial in court.

Depositions.

Letters rogatory.

Depositions without commission.

Interrogatories.

Manner of taking depositions.

1098. When it becomes necessary to prove a fact other- Affidavits.
than in a regular trial, for instance when the court is asked
ake some order or issue some writ which is not a matter
urse but depends upon the existence of special facts whose
ence must be established before the court can act, the proof
ially made by affidavits. An affidavit is a written state-
of facts, made by a party to a proceeding or by any one
has knowledge of the facts, who is called the affiant or
ient, and sworn to before some public officer authorized to
nister oaths, usually the clerk of the court or a justice of
peace or notary public. The certificate of the officer at the
of the affidavit that it has been sworn to is called a *jurat.* Jurat.
reliminary and incidental matters for which affidavits are
ally used it is not practicable to adhere strictly to the rule
a witness must testify to facts within his personal knowledge
Accordingly an affidavit in case of necessity may be made Hearsay in affidavits.
earsay; but if so, the deponent should declare in his affidavit
it is so made, and should state the sources of his informa-
and the reason why the affidavit of the person who has
nal knowledge can not be obtained.

The difference between a deposition and an affidavit is, that Difference between depositions and affidavits.
position is taken on notice to the other party and both
s have a right to put questions to the witness, whereas an
vit is taken *ex parte* without any notice to the other party;
osition is intended for use in a trial as a substitute for the
testimony of the deponent himself, and, like testimony gene-
can not be made upon hearsay, but an affidavit can not
ed on a trial but only in some preliminary or incidental
eding and may in case of necessity be based upon hearsay.
a pleading or petition to the court, if sworn to, may generally Pleadings used as affidavits.
ed as an affidavit, and so may a deposition.

CHAPTER LXX.

SPECIAL COMMON LAW PROCEEDINGS.

Assizes.

1099. The procedure by assize, if not actually then introduced, was first largely used under the Norman Kings, and is thought by many to have originated in Normandy. It seems to have been originally employed in inquires conducted on behalf of the crown, especially in matters connected with the royal revenue, but, being cheap and expeditious, was afterwards introduced into private litigation.

Original writ.

The proceeding was begun by an original writ directed to the sheriff, and stating the question on the affirmative decision of which the plaintiff would *prima facie* be entitled to a judgment in his favor, *e.g.* in an assize of novel disseizin, whether the plaintiff had been seized of the land within a short period before the issuing of the writ and whether the defendant had disseized him. That is, the issue to be decided, instead of being evolved by the pleadings after the defendant had appeared, as in an ordinary action, was stated at the outset in the writ.

The issue.

Recognitors.

The writ commanded the sheriff to select twelve free and legal, *i.e.* properly qualified, men of the vicinage or neighborhood as recognitors or jurors and summon them to appear on a day named in the writ before the circuit judges prepared to make recognition of the matter mentioned in the writ, that is, to make a report to the court about it. The recognitors or assize jury (*juratores, jurata*) were themselves called an assize.[1] The defendant was also summoned to appear on the same day. The recognitors did not conduct their investigation in court with the aid of witnesses after the manner of a modern jury. There was in fact no trial at all The cases in which assizes were used were generally matters relating to land, for instance who was seized of a certain piece of land at a certain time, which would be matters of common noteriety in the neigh-

Summons.

Investigation by recognitors.

[1] The word assize meant: (1) an assessment, (2) a law or edict, (3) a mode of trial by recognitors, (4) the body of recognitors, (5) the trial itself, (6) the sittings of the judges at circuit, see § 185.

ıood, and the recognitors were supposed to report from their knowledge of the facts. It was for this reason that the required them to be taken from the vicinage. If they did in fact know about the matter, they were at liberty to rm themselves by inspecting the property or inquiring of rs. They spoke *de visu et auditu.* On the appointed day recognitors appeared in court and delivered to the judge their gnition, or verdict upon the question submitted to them. If were really impartial men, this was a much better method inding out the truth than most of the modes of trial then ıse, and it accordingly became very popular.

Recognitors spoke from personal knowledge.

Verdict.

If after the taking of the recognition the defendant had extraneous defence to set up, judgment was given at once the verdict. But if the defendant had some ground of nce not included in the issue already passed upon by the gnitors, he was permitted to make it by a plea. In that the recognition went for nothing, a new issue was formed the pleadings which had to be tried in some other way, and proceeding became in fact an action.

Judgment.

Defence.

Trial.

From about the reign of Henry II the royal courts began to assizes or recognitions by twelve men as a mode of trial in ons; and by a statute of that King the defendant in a writ of t was permitted to put himself upon what was called the grand ze of sixteen recognitors instead of resorting to trial by battle.

Use of assizes.

The grand assize.

Out of the recognitions was developed trial by jury. Witnesses allowed to be called into the court for the further enlighten- t of the recognitors, and gradually the practice of selecting for recognitors who had personal knowledge of the matter in ute became obsolete, and they derived their knowledge entirely the evidence produced by the parties in court. But the old ıes, jury, inquest, verdict and recognition, remained in use ıgh with somewhat changed meanings. The jury is still spoken s a jury of the vicinage, and to this day must be drawn the county where the trial takes place, and for a long it was considered that a jury could not inquire into any facts happened outside of the county.

Origin of trial by jury.

1100. Proceedings by means of special writs are usually ın by a petition, sworn to by the petitioner or supported by

Procedure in special proceedings.

affidavits, filed in the court, setting forth the facts of the case and praying for the writ. In proceedings in the name of the King or state an information takes the place of a petition. In some cases the writ asked for is issued as a matter of course immediately upon the filing of the petition. It is then in the nature of *mesne* process. The respondent's answer is made in the form of a return to the writ, and after hearing the parties the court makes a final order, which corresponds to a judgment. In other cases the court makes an order for the respondent to show cause why the prayer of the petition should not be granted, *i.e.* why the writ should not be issued, or issues a citation or summons to the defendant to appear and answer the petition; the defendant on appearing presents affidavits containing his grounds of defence; and the court after a hearing makes an order granting the writ, which is then in the nature of final process.

The return presumed true.

In all of these proceedings the return to the writ, like returns generally, was formerly conclusively precumed to be true for the purposes of the proceeding, so that no question of fact could arise in the proceeding itself. If the return was in fact false, that was a ground for an action for a false return. But now the petitioner is permitted to traverse the return, *i.e.* to deny its truth. If any controverted question of fact thus arises, the court has power, if it chooses, to order a trial by jury. But this is very seldom done. If the court can not decide the question from the affidavits presented by the parties, it will usually either call witnesses or send the matter to a referee for decision.

Questions of fact.

Petition and order to show cause.

When no special writ is asked for and no other form of procedure is prescribed by law, a petition or information and, if there is an adverse party who is entitled to a hearing, an order to show cause or citation is the usual form of proceeding in all applications to a court, except an application for an order in a proceeding already pending where a motion is usually sufficient.[2]

Particular proceedings.

1101. A few of the more important special proceedings call for separate mention.

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[2] See § 937.

In *habeas corpus* the proceeding begins by a petition stating illegal imprisonment and praying for the writ. This may be ented by the prisoner himself or his attorney or by any on on his behalf. The last is an exception to the general that only a party in interest may commence legal proceedings; it is allowed from the necessity of the case, because the ner himself may be unable to act. On the filing of the ion the writ is usually issued at once. It is directed to the on holding the prisoner in custody, who must produce the ner in court and state in the form of a return to the writ cause of his imprisonment. Sometimes instead of the writ g issued immediately upon the filing of the petition, an r to show cause why it should not be granted is made. In case the respondent states the grounds for the imprisonment, h ordinarily would go into the return to the writ, in the of affidavits, and the question whether the prisoner ought e released is argued and decided as on a motion. If the t decides in the negative the writ is refused; if in the mative, the writ is issued, and the final order is made as soon he prisoner is brought into court without the necessity of any ing on the return of the writ. The practice is different in rent places.

Habeas corpus.

Who may take proceedings.

The writ.

The return

Order to show cause.

1102. In *mandamus* upon the filing of the petition the l course is to issue at once an alternative writ of *mandamus*, manding the respondent either to do the act or to show cause he does not. If he obeys the first writ, he makes a return ng that he has done so, and there are no further proceedings. e does not, he must state in his return the reasons for his al. If on the hearing the court finds that no sufficient e for refusing to do the act has been shown, a peremptory *damus* issues commanding the respondent to do it, to which eturn is admitted but that he has done it. Sometimes instead n alternative *mandamus* an order to show cause why a per- tory *mandamus* should not issue is made. This has practically same effect as an alternative writ.

Mandamus.

Alternative writ.

Peremptory writ.

Order to show cause.

1103. Disobedience to an order or mandate of the court, pt a judgment which can be enforced by an execution, is a empt of the court, for which the party guilty of the dis-

Contempt of court.

Civil contempts.

obedience may be punished. If the order or mandate is made for the benefit of a party in a civil proceeding, the disobedience is called a civil contempt and, though in theory an offence against the court, is in reality rather a private injury to the party, and the court will not take any notice of it except at that party's request. In such cases proceedings to punish the offender for contempt are really for the purpose of enforcing the order or mandate, and are the regular means of doing so in cases where an execution can not be used for that purpose.

Enforcement of orders of court.

Petition.

The proceedings begin with a petition by the injured party stating the facts of the alleged contempt, on which an order is made that the respondent show cause why an attachment should not be issued against him. On his appearance to show cause, the petitioner files interrogatories against him, which are in effect a declaration put into the form of questions covering all the facts constituting the alleged contempt. To these the respondent must make answer, and if after a hearing the court decides that the respondent has been guilty of a contempt, a writ of attachment is issued, ordering the sheriff to arrest the respondent and bring him into court to be punished for his contempt. The so called punishment in cases of civil contempts is not really inflicted as a penalty but as a mean of redress to the injured party. If the contempt consisted in refusing to do an act which the respondent can still do, he will generally be imprisoned until he does it. In other cases a fine is imposed payable to the injured party and sufficient in amount to compensate him for the wrong done him, that is, it is practically an award of damages, and the respondent is imprisoned till he pays the fine. If there is reason to apprehend that the respondent will abscond, the attachment may issue at once on the filing of the petition, without any order to show cause, and the interrogatories be exhibited when the respondent is brought into court on the attachment. At present the interrogatories are usually dispensed with; the respondent on appearing to show cause or on the attachment present affidavits containing his defence, the petitioner having the right to put in counter affidavits if he pleases, and the matter is heard and decided on the allegations contained in the petition and affidavits as on a motion.

Order to show cause.

Interrogatories.

Attachment.

Punishment for contempt.

Attachment in first instance.

Modern practice.

CHAPTER LXXI.

PROCEDURE IN THE CIVIL LAW COURTS.

Procedure in equity.

104. A suit in equity is begun by the plaintiff, who is alled petitioner, complainant or orator, filing a bill or peti- n the court. This was anciently called an English bill, e at a time when common law pleadings were in French in the equity courts used English. There are no forms of s in equity.

The bill.

Form of a bill.

105. The bill, beginning at first with a simple statement ts and a prayer for relief, became in the later practice a ong and complicated document. Its formal parts are as :.

Heading.

1) The heading or caption, containing the name of the and the date of filing.

Introduction

2) The introduction, containing the address to the court ie name and addition of the petitioner, and in later times of the defendant or respondent.

Stating part.

3) The stating part, in which the petitioner sets forth the n which he bases his claim. This corresponds to a decla- at law.

Common confederacy clause.

4) The common confederacy clause, in which it is alleged ie defendant is combining and confederating with divers s at present unknown to the petitioner to wrong and injure vhom the petitioner prays permission to bring into the suit endants when he shall have discovered them. The original of this clause seems to have been to lay a foundation for equent request to the court to add other defendants if it become necessary; but it afterwards became purely formal.

Charging part.

5) The charging part, in which the petitioner mentions the s which he supposes the defendant will set up against nd alleges or charges that they are false. The reason for this, instead of waiting for the defendant to set them up own pleading, is that a bill in equity, unlike a declara- ; law, is not intended merely to inform the court and

the adverse party of the nature of the plaintiff's claims, but by means of interrogatories, as will be presently explained, to extract information from the defendant; so that, as interrogatories are only permitted about matters contained in the bill, it is necessary for the plaintiff to mention here anything about which he desires to interrogate the defendant, which is not mentioned in the statement of his case in the stating part.

Jurisdiction clause.

(6) The jurisdiction clause, or allegation that the plaintiff has no remedy at law, it being, as has been explained, a fundamental rule in equity not to interfere when the common law provides an adequate remedy. It must in fact appear from the stating part of the bill that the case is a proper one for a court of equity to entertain, but this formal allegation to that effect was formerly considered necessary.

Interrogatories.

(7) The interrogatories, which are a series of questions addressed to the defendant about such of the matters mentioned in the bill as the plaintiff desired information about.

The prayer for relief.

(8) The prayer for relief, asking for the relief to which the plaintiff thinks himself entitled. There is always added a prayer

General relief.

for general relief, that the plaintiff may have such other and farther relief as to justice and equity appertains, so that in case the plaintiff has by mistake specified the wrong kind of relief, he may still be able to obtain such as he is entitled to.

The prayer for process.

(9) The prayer for process, a request that proper process may issue to compel the defendant to appear and answer the bill.

Name of defendant.

(10) The name of the defendant.

Signature of counsel.

(11) The signature of counsel, which is required as a guaranty of good faith.

Verification.

(12) The verification, or affidavit of the plaintiff that the statements in the bill are true. This is not required, but is sometimes added if the plaintiff intends to use the bill as an affidavit.

Modern bills.

1106. In modern times, at least in the United States, the common confederacy clause and the allegation of no remedy at law are usually omitted; and if the plaintiff does not desire to interrogate the defendant in the bill, the charging part and the interrogatories

Interrogatories.

are also left out. After the pleadings are finished, either party may at present file interrogatories for the other to answer about

matter contained in the pleadings, which is usually found convenient than to insert them in the bill itself.

[107. Original writs were not used in equity. The regular s is a writ of *subpoena*[1] issued from the court after the filing › bill, directed to the defendant, commanding him under a ty to appear and answer the bill. In former times if the dant did not appear further process was issued to compel his rance. This in the case of a natural person was first a *capias*, ed if necessary by various other writs, including a writ of stration to seize all his chattels and the rents and profits of al property as security for his appearence, and in the case of a ation a *distringas*. When the defendant appeared he was ied as for a contempt for his disobedience to the *subpoena*. ll that is now abolished, and if the defendant does not appear e *subpoena* the bill is taken *pro confesso* and a decree made st him in his absence; and the threat of a penalty for not ring, from which the writ of *subpoena* took its name and is still inserted in the writ, has become a mere form.

Subpoena

Further process.

Taking the bill *pro confesso*.

[108. If the defendant appears, he may demur, plead or r. A demurrer is the same as at law, and the issue of law by it is disposed of in the same manner as at law, that is, ›urt hears arguments and then proceeds to make its decree.

Demurrer.

f the defendant has any ground of defence consistent with the of the allegations in the bill, which is sufficient to dispose › case without its being necessary to answer in detail those tions, he may set it up in a plea. A plea may contain r which at common law would go into a dilatory plea, such nt of jurisdiction in the court or some disability on the of the plaintiff, or matter in bar which at common law support a plea in confession and avoidance, such as a release former decree. A plea however is seldom resorted to, as efendant may make all those defences in his answer.

Plea.

f the defendant does not demur or plead, or if his demurrer ea is unsuccessful, he must answer the bill. There is no l issue, nor is it sufficient, as at law, to traverse some one ial allegation in the bill. The defendant must go over the

Answer.

[1] This is a different writ from the writ of *subpoena* used to summon ›es; see § 1096. The latter is called a *subpoena ad testificandum*.

entire bill, answering each allegation and each of the interrogatories fully and completely, not only to the best of his knowledge but of his information and belief, and must swear to his answer. If his answer is incomplete or imperfect, the plaintiff may except to it, and the court will order him to put in a further answer. He may also insert in his answer any additional facts furnishing a ground of defence.

Exceptions to answer.

Further pleadings.

There are no further pleadings, except a formal replication by the plaintiff. The pleadings do not go on to an issue as at common law. If the plaintiff has new matter which he desires to set up in reply to the answer, he can not put that into his replication, but must apply to the court for permission to amend his bill, and must then file a new amended bill, in which the new matter may be inserted and to which the defendant may again demur, plead or answer. If the defendant on his part has any matter of counterclaim against the plaintiff, that should not go into the answer; but the defendant files a cross-bill, to which the plaintiff in turn must demur, plead or answer. But the cross bill is not a separate action.

Amended bill.

Cross-bill.

Hearing on bill and answer.

1109. Since the pleadings in equity are much more full and detailed than at common law, it often happens, especially if interrogatories have been filed and answered, that all the facts sufficiently appear in the pleadings and the answers to the interrogatories, and that no trial to ascertain the facts is necessary. If so, the case is set down for a hearing upon the bill and answer, or upon the pleadings, and the court hears arguments and renders a decision as if upon a demurrer. This is the proper course to take if the plaintiff thinks the answer insufficient in law; he can not formally demur to it. On such a hearing, since the plaintiff by his bill has required the defendant to answer under oath, if the allegations in the bill and answer in any respect conflict, the answer rather than the bill is taken as true.

Effect of answer.

Trial.

1110. But in case of such a conflict, if the plaintiff is not content to accept the statements in the answer as correct, a trial of the questions of fact becomes necessary. This is not had by a jury nor are the witnesses examined in court. A master[2] or referee is appointed to take proofs, who takes the depositions[3] of the

Reference to master.

[2] See § 160.

[3] See § 1097.

ıses on written interrogatories prepared by the parties, and s these to the court, where they are kept secret until all the ıses have been examined, when on the motion of either the court will make an order permitting them to be seen, is called passing publication or passing the proofs. The ıg before the court is then had on the pleadings and roofs or depositions. On such a hearing the court has to questions both of fact and of law, but the allegations e answer are taken as true unless contradicted by more one witness; as against a single witness the defendant be believed. This rule, however, is now abolished in most

Hearing on pleadings and proofs.

Effect of answer.

ıuch was the ancient and regular method of trial in equity, is still sometimes used. But at present it is more common ce the depositions on oral interrogatories; and not unfre-ly the witnesses are brought into court and examined before ıdge, the trial then being like a trial at law except that ıdge acts in the place of a jury. Sometimes also the case t to a master or referee, not merely to take the testimony witnesses, but to hear and decide the disputed questions of He makes a finding of facts, containing not the testimony ge but a statement of what facts he finds to be proved by ridence, and then at the hearing before the court no ques-f fact is open to discussion, but the only point debated is decree ought to be made upon the facts as found by the r or referee. The court has power to reject the report ler a further report; but will do so only for some good

Modern methods of trial.

References to find facts.

Finding of facts.

111. If the court desires to have the opinion of a jury any doubtful question of fact, a feigned issue is made up. consists of pleadings in an imaginary action at law, so drawn to present an issue upon the question on which the court ı information. This is sent into one of the courts of com-aw where there is a jury, and tried just as if it were an suit; but when the jury have given their verdict, the court , instead of rendering a judgment upon the verdict, certifies k to the court of equity. The verdict of the jury, however, conclusive upon the equity judge. It is only for informing

Feigned issue

Effect of the verdict.

his conscience, as the expression is; he may disregard it and have the question tried again, if he thinks best. The questions of fact involved in an equity case need not all be tried at the same time or in the same way. Some may be sent to a jury on a feigned issue, others to a referee or master and others tried by the court. This is simply a matter of convenience. What method of trial shall be used lies in the discretion of the judge; but if the parties agree in desiring a particular method, the judge will usually consent.

Decree.

1112. The judgment of a court of equity is called a decree.

Interlocutory and final decrees.

It may be interlocutory or final, and interlocutory decrees are much more common in equity than at law. If an interlocutory decree orders an account to be taken, or it becomes necessary to ascertain some further fact, such as the amount which a party ought to recover, the practice is to refer the matter to a master or referee, and on his report, or, as the technical expression is, on further consideration, the final decree is made. A decree in equity need not be, like a judgment at law, simply for one party and against the other. It ought to deal with the whole case in detail, determining the rights of such individual separately, without regard to whether he is plaintiff or defendant, and giving to each such relief as he is entitled to. Therefore in general it makes no difference to a party in an equity suit whether he is nominally a plaintiff or a defendant. If a party who ought to act as a plaintiff refuses to do so, he may be made a defendant; for instance if A and B are joint cestuis que trust, and the trustee has committed a breach of trust for which A desires to sue him, and B refuses to join as plaintiff, A may sue alone and make B a defendant. The decree should contain a full statement of the facts of the case as found by the court to exist. But if the facts are fully and correctly stated in any other document filed in the case, for instance in a finding of facts made by a master or referee, it is generally sufficient to refer to that in the decree. Sometimes the judge makes a finding of facts separate from the decree.

Reference after interlocutory decree.

Farther consideration.

Form of decree.

Statement of facts.

Costs.

Costs are not a matter of right, as at law, but rest in the discretion of the court. They are however usually awarded to a successful party.

1113. Some decrees execute themselves, as it said; that is, immediately and of their own force the effect desired, and nal process is necessary to carry them into effect. Such is ree for a strict foreclosure, which at once cuts off the equity demption and leaves the mortgagee in the situation of absolute owner. Decrees executing themselves.

A decree for an injunction is enforced by a writ of injunc- issued from the court, directed to the defendant, forbidding and his agents and servants to do the act intended to be ied. Disobedience to the writ is a contempt of the court punishable by fine or imprisonment. Writ of injunction.

The ordinary method of enforcing the decrees of a court uity is by process of contempt, the party against whom the e is made being fined or imprisoned if he disobeys it. Execu- were not formerly used even on decrees for the payment oney, but at present by statute courts of equity are usually wered to issue executions in proper cases like courts of law. Enforcement of decrees generally. Executions.

1114. An error in a decision of the court is ground for ppeal, which is taken by filing a notice of appeal with the of the court and serving a copy of it upon the opposite . Generally not only a final decree but an interlocutory e or order can be appealed from. On an appeal the same s which were before the lower court, that is, the pleadings if evidence was taken, the depositions of the witnesses or inding of facts, or copies of them, are sent to the appellate , and a new hearing is had there, so that questions of fact ell as of law may be reviewed. If the trial was had before ourt itself by witnesses being produced and examined there, the judge commits any error which at common law would ie foundation for a bill of exceptions, a statement called a which is equivalent to a bill of exceptions, is prepared and to the appellat court with the other papers. If the trial before a referee or a jury, the proper method of correcting such error is in the first place by a motion to the court to the report or verdict, which corresponds to a motion for a trial at common law. Appeals. Case on appeal. Motion to reject a report or vedict.

1115. When an action is brought to obtain an injunction, sometimes necessary to have a temporary injunction to Temporary injunctions.

prevent the defendant from doing the act pending the suit. This may be granted on motion at the commencement of the action or at any time before the decree. Sometimes such an injunction is granted *ex parte*, that is, without notice to the party enjoined In that case he has a right to move at any time to have the injunction vacated. But usually notice of a motion for an injunction is required.

Writ of *ne exeat.*

1116. If the object of the action is to compel the defendant to do some act, such as to make a conveyance of land or specifically perform a contract, and there is reason to apprehend that he will depart from the jurisdiction so that the court will not be able to enforce its decree, a writ of *ne exeat regno*, or in the United States *ne exeat republica*, may be issued, commanding the sheriff to arrest the defendant and hold him until he gives security that he will duly perform whatever may be decreed against him. This writ serves the same purpose as a *capias* at common law

Procedure in admiralty.

1117. A suit in admiralty is begun by filing in the court a libel,[4] which contains a statement by the plaintiff or libellant of the facts of his case. There are no forms of action. The

Libel.

libel is merely a simple direct statement, without any formal parts such as are found in a bill in equity. It must be properly addressed to the court and signed by counsel, and should also be articulated, that is, divided into numbered articles or paragraphs.

Monition.

1118. On the filing of the libel the court issues a writ called a monition or citation, directed to its executive officer, commanding him to summon the defendant to appear and answer the libel.

Notice of suit.

In an action *in rem* the officer is commanded to give public notice of the suit, which he does by serving the monition upon the master of the vessel or any person who is in possession of the goods, publishing it in newspapers, and posting up copies in certain

Proclamation in court.

public places. On the return of a monition *in rem* public proclamation is also made in the court calling upon all persons interested to present their claims. In an action *in rem* a writ

Attachment.

of attachment is also issued, which is usually combined with the monition, under which the officer seizes the thing against which the action is brought and holds it pending the action unless

[4] From *libellus*.

one gives bail for it and procures its release, which any sted party has a right to do. In actions *in personam* an ment is sometimes granted against the body of the defend- n cases where a *capias* might be had at law, and the lant if arrested under the attachment may give bail, his men being known as *fidejussors*. Bail. Attachment against the body. Bail.

119. If the action is *in rem*, any person desiring to ene must present to the court a written claim stating his st in the thing, on which he is permitted by an order of ourt to become a party to the action. Intervening. Claim.

A defendant who appears or intervenes must either demur swer to the libel, and there are usually no farther pleadings. lefendant has a counter-claim, he sets it up in a defensive tion, which is analogous to a cross-bill in equity, to which laintiff in turn must demur or answer. The modes of trial ibstantially the same as in equity, and the hearing before ourt is called taking information by the court. Pleadings. Counterclaim. Trial.

120. The decree may be interlocutory or final, and an it may be taken if necessary before a referee. In an action n to enforce a maritime lien the decree orders the sale thing and the payment of the liens upon it out of the ds. The sale is conducted by the executive officer of ourt under a writ of *venditioni exponas* from the court, is a sort of writ of execution. Decrees for money damages iforced by execution. Decree. Sale. *Venditioni exponas.* Execution.

Appeals may be taken from decrees or orders as in equity. Appeals.

121. The procedure in courts of prize it is not necessary cribe here; it differs considerably from that in the instance All proceedings in prize courts are *in rem*. Prize courts.

122. The procedure in the ecclesiastical courts is substan- the same as in suits *in personam* in admiralty. In the e courts in the United States the name petition is generally nstead of libel, and in some states the pleadings are oral. ecclesiastical courts proceed on the theory that their function iat of the church itself, is not to interfere in purely worldly , but to enforce upon men the observance of moral and is duties and keep them from sin. Their commands, pro- ns and penalties are imposed for that purpose only, or by way Procedure in the ecclesiastical courts. The American probate courts. The ecclesiastical courts act *pro salute animæ*.

of penance or atonement for wrongdoing, for the good of the offender's soul, *pro salute animae*. Therefore, except in case of such decrees as enforce themselves, such as decrees of divorce, the probate of wills or the granting of administration, the only process available to them for enforcing their decrees is the excommunication of a recusant. But sometimes the court, before resorting to that extreme measure, issues a monition or warning to the offender, and excommunicates him only in case he disobeys it. Excommunication is not purely a spiritual penalty. Besides the extremely unfavorable effect which in superstitious times it was believed to have upon the offender's prospects in the next world, it is attended in this life by various civil disabilities somewhat similar to those which attached to outlawry. The courts of probate in the United States enforce their decrees in the same manner as courts of equity, as also do the courts to which the secular jurisdiction of the ecclesiastical courts has recently been transferred in England.

Decrees executing themselves.

Excommunication.

Decrees of probate courts.

CHAPTER LXXII.

THE MODERN PROCEDURE.

The modern procedure.

1123. The modern procedure was first introduced in New York in the year 1848. It has been adopted in many of the United States. The national courts in cases at law follow the procedure of the respective states where they sit, but in equity and admiralty they still adhere to the old procedure in a somewhat modified form. In England the modern procedure was established by the Judicature Act of 1873.[1]

General characteristics.

This procedure is nearly the same everywhere, though with local variations. Its aim is to retain and combine what was best in all of the old systems while getting rid of useless formalities and fictions. There are no forms of action, and in the main no distinction in point of procedure between cases at law and in equity. In any action the court may give any sort of relief which it has jurisdiction to give, whether legal or equitable or both; for example in a single action for a nuisance it may award damages for the injury done by the nuisance, which is a legal remedy, and an injunction against its farther continuance, which is an equitable remedy. This fusion of law and equity, however, extends only to the adjective law. The difference in the substantive law between legal and equitable rights and duties remains as it was before. And even in regard to procedure, trial by jury is still a matter of right in actions which in their nature are legal, in which legal remedies are sought, while, as formerly, it is seldom used in equitable actions.

No forms of action.

Legal and equitable remedies.

Fusion of law and equity.

Trial by jury.

Summons.

1124. An action is begun by a writ of summons, which in some places is issued from the court as was the old practice, and in others by the party himself or his attorney without the necessity of applying to the court for it. It is served by the sheriff or some other proper officer or by an indifferent person, and its due service must be proved by the return of the officer or by an affidavit of the person serving it. Personal

Service of summons.

[1] See § 199.

Personal service.

service is made by delivering a copy of the writ to the defendant, or in some places by leaving it at his residence, within the territorial jurisdiction of the court. If personal service can not be made, the

Substituted service.

court will make an order directing service in some other way, as by publication in the newspapers or sending a copy of the summons by mail.[2] If the defendant appears generally,[3] no summons is necessary,

Appearance.

and any defect in the summons or in the service of it becomes of no importance. Appearance is effected by a written notice of appearance filed in the clerk's office or served upon the plaintiff's attorney.

Complaint.

1125. The first pleading by the plaintiff is called in the United States a complaint or petition, in England a statement of claim. It should contain a plain statement of the actual facts constituting the ground of the action, without fictions or unnecessary prolixity, and a prayer for relief. A prayer for general relief

Counts.

is usually added, as in a bill in equity. Only one count is allowed upon a single cause of action; but any number of separate

Joinder of causes of action.

causes of action of the same nature or arising out of the same transaction may be stated in separate counts.

Demurrer.

The defendant may either demur or answer. If he demurs and his demurrer is overruled, he is permitted afterwards to put in an answer, though generally on condition of paying costs on

Answer.

the demurrer. The answer, which is called in England a statement of defence, may contain as many grounds of defence as the defendant chooses to set up, either in abatement or in bar, though in some places separate pleas in abatement are still used. Separate defences must be put into separate paragraphs. The answer may contain denials of the allegations in the complaint, new matter in avoidance or counterclaims, or all of these. A denial may be of some particular part or of the whole of the complaint, which latter is called a general denial.

Farther pleadings.

Usually there are no pleadings after the demurrer or answer, unless the answer contains a counterclaim, in which case the plaintiff

Reply.

must reply to that. But in some places a reply is required or may be ordered by the court if the answer contains any new matter. And any pleading containing new matter may be demurred to. It is not necessary that the pleadings should be carried to an issue.

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[2] As to the effect of such service, see § 1141.

[3] See § 1041.

1126. Pleadings are either filed in court or served upon the attorney of the opposite party. They need not be sworn to; but it is generally the rule in the United States that if any pleading is sworn to all subsequent pleadings must be. Therefore it is very common for the plaintiff to swear to his complaint in order to prevent the defendant from putting in a general denial, which would impose upon the plaintiff the task of adducing evidence to prove the whole of his complaint, whereas if the defendant is compelled to swear to his answer he can deny only those allegations in the complaint which he really believes to be untrue and intends to controvert.

Filing or delivery of pleadings.

Verification.

Interrogatories can not be inserted in the complaint, but in most places either the parties may file interrogatories separately from their pleadings, or the court upon motion of one of them for sufficient reasons shown will order the other party to submit to an oral examination before a master or referee before the trial.

Interrogatories.

Examination of a party before trial.

1127. The methods of trial are as follows, the old method in equity of taking the depositions of the witnesses before a master not being used.

Trial.

In legal actions either party has a right to a trial by jury, if he insists upon it. In equitable actions it may be ordered by the court. In that case a feigned issue is not used, but a plain statement in writing of the question to be tried is prepared for the jury.

Trial by jury.

In equitable actions generally, and in actions at law if a jury trial is not desired, the judge himself tries the questions of fact in open court without a jury, or may in his discretion send any or all of such questions to be tried by a referee. Sometimes the referee is empowered to decide the whole case, both facts and law, and to draw up the judgment; but this can be done only by the consent of the parties.

Trial by the judge.

Reference.

If there is no trial by jury, it is the practice for the judge or referee before whom the trial is had to draw up in writing a finding of facts, that is, a statement *in extenso* of such facts as he finds to have been proved, and, if he is also empowered to decide questions of law, a statement of his conclusions of law and the judgment which he thinks ought be rendered. This is filed in court and becomes a part of the

Finding of facts.

Conclusions of law.

Exceptions.

record. Exceptions may be taken by either party to any ruling or decision made by the judge or referee in the course of the trial, or to any conclusion so made and filed by him.

Motions in arrest *etc.*

1128. Motions in arrest of judgment or *non obstante veredicto* are not permitted, because the party might have demurred, and if his demurrer was unsuccessful could then have answered over. But it is a common practice to permit the defendant when the case is called for trial, if he thinks the complaint insufficient, to make an oral motion to dismiss the case; because, if the complaint really does not state a cause of action, it would be useless to spend time in trying the questions of fact. If such a motion is granted, it has the effect of a nonsuit. If the plaintiff thinks the answer insufficient, he may in the same way move for a judgment in his favor on the pleadings. The defendant may also move for a nonsuit when the plaintiff has rested his case at the trial, as formerly at law.

Motion to dismiss at trial.

Nonsuit.

New trial.

A motion for a new trial may be made after the verdict or decision and before judgment or within a limited time after judgment. It is sometimes made immediately after the trial to the trial judge himself instead of to the court *in banc*, in which case no bill of exceptions is necessary, the facts being already within the judge's knowledge. If his order granting or refusing a new trial is to be appealed from, or if the motion for a new trial is made before another judge or before the court *in banc*, it is necessary to prepare a case containing the party's exceptions and a history of the proceedings for the information of the court, which is equivalent to a bill of exceptions[4] and is sometimes so called. If an error is committed by a referee in a trial before him, the proper remedy is not a motion for a new trial, but a motion to the court to reject the referee's finding or send it back to him for correction.

Case.

Motion to reject report of referee.

Judgment.

1129. The judgment, which may in most places be entered immediately after the trial, is either a simple judgment for money or for the possession of land or a chattel, as at common law, or resembles a decree in equity, according to the nature of the case. It may be interlocutory or final; and after an interlocutory judgment a writ of inquiry may issue to have damages assessed

Writ of inquiry or hearing in damages.

[4] See § 1067.

by a sheriff's jury, a hearing in damages be had before the court with or without a jury, or the case may be sent to a master or referee to take an account or find farther facts, as may be necessary.

Enforcement of judgments.

1130. The judgment may be enforced by execution or by proceedings for contempt according to its nature. The old writs of execution are in use in some places, but generally executions for money are either against all the property of the defendant, both real and personal, which sort of writ is called simply an execution against property, or against the body, or both.

Execution.

Appeals.

1131. Writs of error are obsolete in most places. Generally an appeal can be taken from any judgment or order of the court except an order which is purely discretionary. An appeal is taken by notice as in equity, and a copy of the whole record is sent up to the appellate court. If the error complained of does not appear upon the record, a case is prepared as on a motion for a new trial and made a part of the record. On an appeal the higher court may affirm, reverse or modify the judgment, grant a new trial or send the case back to the lower court for farther proceedings. After a trial by jury the appellate court can not review any question of fact that has been decided by the jury, but the appeal is confined to questions of law. In other cases the appeal may usually be taken from an erroneous decision either on the facts or the law. In an appeal on a question of fact a case on appeal must be made containing all the evidence that was given at the trial on the question.

Judgment on appeal.

Questions of law and fact.

Perfecting appeal.

Sometimes the appellant must perfect his appeal by giving security that he will pay the costs of the appeal or that he will perform the judgment rendered against him in the lower court, if his appeal is unsuccessful. And even when this is not required, the appeal will not usually have the effect of a *supersedeas*, that is, will not prevent the judgment of the lower court from being enforced pending the appeal, unless such security is given. But the court may make an order staying the enforcement of the judgment till the appeal is decided, even without security being given. If however that judgment is enforced and then is afterwards reversed on the appeal, the party procuring its enforcement must make restitution *in integrum*, that is, must restore all that he has received under the judgment.

Supersedeas.

Restitution *in integrum.*

Provisional remedies.

1132. A provisional remedy means some temporary remedy granted by the court pending the suit, to prevent the party against whom it is granted from doing some act which would under the judgment nugatory or to facilitate the enforcement of the judgment when rendered. Under the old procedure these remedies were usually obtained by means of special writs or in particular forms of action either at law or in equity. Now they are allowed in proper cases on motion at any stage in the action. The party applying for a provisional remedy must give security by a recognizance or undertaking with sureties to indemnify the other party for any loss or damage caused to him if it turns out that the remedy ought not to have been granted

Security.

Order of arrest.

1133. In an action to recover money, if the case is such that after judgment against the defendant an execution can be issued against his body to enforce payment, or in an action to compel him to do an act, if there is danger that he may abscond or depart out of the jurisdiction of the court, the plaintiff may have an order or warrant for his arrest pending the action. This is equivalent to a *capias ad respondendum* at common law or a writ of *ne exeat* in equity, and is often called by those names. Imprisonment for debt has generally been abolished. The rules as to when imprisonment on an execution and a warrant of arrest are permitted are not quite the same in all places. But in most places arrest is allowed in actions for torts and for debts contracted by fraud or breach of confidence. If the party arrested gives bail, it is not necessary for him afterwards to put in bail above. The bail once given stands for the whole duration of the action. Common bail is abolished. The plaintiff can require the bail to justify; and if he omits to do so within a reasonable time, the sheriff is discharged from responsibility for their sufficiency.

When arrest is permitted.

Bail.

Attschment.

1134. Attachment against the body means the same as arrest. Attachment against property is a seizure of a party's property pending the suit under a warrant from the court as security for the performance of any judgment that may be rendered against him. In some of the United States an attachment is allowed as a matter of course in all actions for money. But in most places it can only be had in an action

ex contractu, in certain cases specified by statute, as when the defendant lives out of the jurisdiction of the court, or is concealing or disposing of his property to prevent its being taken on execution, or is about to do so.

Attachment of chattels.

Chattels are attached by the sheriff's actually seizing them. The owner may usually get them back by giving security. A practice prevails in the United States for the sheriff to deliver the property attached to some friend of the debtor, who gives him a receipt for it agreeing to return it to him at any time on demand. The sheriff however does this at his own risk, and is responsible to the party in whose favor the attachment was granted if the receiptsman fails to redeliver the property.

Receipts for property attached.

Attachment of land.

An attachment of land is effected by the sheriff's simply leaving a written notice of the attachment at the office where deeds of the land are to be recorded, which notice is entered in a book kept for the purpose.

Levy on property attached.

If a judgment is rendered against the party whose property has been attached, an execution can be levied on the property. If judgment goes in his favor, the attachment is released and the property restored to him.

Foreign attachment.

1135. Only tangible property can be attached under an ordinary warrant, and in case of chattels only those in which the defendant has a right of present possession; the sheriff can not take the chattels away from any one else who has a right to their possession. But if any person is trustee for the defendant or is indebted to him or has his property in his possession, such property may be attached by what is called foreign attachment, garnishment or trustee process. This consists in a notification from the court to the trustee, debtor or bailee of the defendant, who is called the garnishee, that the money or property in his hands has been attached and that he must not pay or deliver it to the defendant without a farther order from the court. If he does so, he is responsible for its value. After judgment against the defendant, the sheriff on the execution demands the money or property from the garnishee. If the latter improperly refuses to comply with the demand, a creditor's action,[4] or in some places a writ of *scire facias*, will lie against

Creditor's action or *scire facias*.

[4] See § 953.

him to appropriate the property in his hands to the satisfaction of the judgment.

Replevin.

1136. A writ of *replegiari facias* or a replevin order equivalent to such a writ may be had in an action for the recovery of chattels, where formerly an action of replevin would have lain.

Provisional injunctions and receivers.

1137. Provisional injunctions are granted and receivers appointed as formerly in equity.

Provisional remedies against plaintiff.

1138. Provisional remedies are usually granted in favor of the plaintiff against the defendant. But a defendant may also have them in a proper case, especially if he has made a counter-claim in the action, as to which he is practically in the position of a plaintiff.

CHAPTER LXXIII.

THE LOCALITY OF ACTIONS.

Forum.

1139. In the civil law every person has what is called his forum, or place where he may be sued.[1] This is generally the place where he lives or carries on business. Sometimes obligations or particular rights are concieved of as having a forum, where actions may be brought to enforce them independent of the forum of the person against whom the action is brought. There is nothing in the common law similar to the forum. Under the common law practice the name of the county in which the action was to be tried was inserted in the margin of writs and pleadings. This was called the venue, from which the name venue came to be used to denote the place itself, and particularly the county, where the trial was to be had. In England the superior courts all sit at Westminster, and the clerks' offices are there, though trials are usually held at the circuits, so that the venue means simply the place of trial. In the United States the courts in different counties are either separate courts or at least have separate clerk's offices, so that the venue is the place where the action is brought and where not only the trial but generally all the proceedings in the action take place.

Venue.

Local actions

1140. Actions are either local or transitory. In the former the action must be brought or tried, or in technical language, the venue must be laid, in the county where the cause of action arose. All actions to recover the possession of land are necessarily local, because no court in another place could actually put the successful party into the possession of the land. Actions to foreclose mortgages on land and to enforce liens upon land by the sale of the land are also local for a like reason. In most places actions for trespasses upon land are also local, though the reason for this is not so apparent, since only pecuniary damages are sought. An action *in rem* must be brought in the place where the *res* is, where it can be seized in the suit.

Actions *in rem*.

[1] The word forum is occasionally used in the common law to denote the place where an action is actually brought or tried.

Transitory actions.

All other actions are transitory, and as a general rule may be brought anywhere, though in most of the United States it is required by statute that, unless all the parties are non-residents of the state the action must be brought in a county where some one of the parties resides. However the court has power to change the venue and order the action or trial to be transferred to another county for any good reason, for instance if an excited state of public feeling in the county make it difficult to obtain an impartial jury, or for the convenience of parties or witnesses.

Change of venue.

Suits against non residents.

1141. When the defendant lives out of the territorial jurisdiction of the court, he may be sued in a transitory action, if personal service of the process by which the suit is begun can be made upon him within the jurisdiction or if he voluntarily appears and submits to the jurisdiction of the court. Thus if a foreigner comes temporarily into the jurisdiction on a visit or even is passing through in the course of a journey, a suit may be begun against him and the judgment will be binding upon him personally, if he is personally served with process. But in other cases a court has no jurisdiction over a non-resident and can not render any judgment against him. A service of a summons upon him by publication or by mail outside of the territorial jurisdiction of the court is invalid, and will not give the court any jurisdiction of his person. But if he has property within the jurisdiction which can be attached, a suit may be begun against him by attachment, and the judgment in such an action will be enforceable against that particular property, though not sufficient to create any personal obligation against the party himself. In like manner a local action or an action *in rem* will lie, and the judgment will be binding as to the land or the *res*, though the court may not be able to get jurisdiction over the parties interested personally.

No jurisdiction over non-residents generally.

Property within the jurisdiction.

Actions between non-residents.

In transitory actions, when all the parties are non-residents and the cause of action arose out of the jurisdiction, although the court may have jurisdiction if process can be served upon the defendant, yet the courts are very unwilling to exercise it, particularly in actions for torts, and will usually refuse to interfere in purely foreign controversies. Thus if one Englishman should sue another Englishman in the United States for a tort committed in England, the court would probably dismiss the suit unless some

good reason was shown for bringing it there instead of in the courts of the parties' own country.

Effect of foreign judgments.

1142. A judgment can be directly enforced, that is, by execution or process of contempt, only by the same court that rendered it; and a judgment of a foreign court does not create a technical debt, estoppel by record or merger of the cause of action outside of its own country; so that it remains possible, notwithstanding the foreign judgment, to bring another suit for the same cause of action. In such a suit the foreign judgment is very cogent evidence of the rights of the parties; and there is a strong tendency in the modern authorities to hold it conclusive evidence, provided the foreign court had jurisdiction and proceeded regularly, and to refuse to permit the questions decided in it to be again litigated. That is, according to many modern authorities, if an action is brought for a matter that has already been decided by a foreign tribunal, the only inquiry that will be entered upon will be as to the competency of the foreign court and the regularity of its proceedings, and if these are established, its decision on the merits of the case will be taken as correct; and competency and regularity are *prima facie* presumed.

Judgments in another state.

The provision in the constitution of the United States that full faith and credit shall be given in every state to the judicial proceedings of other states makes a judgment of the courts of one state conclusive in every other state, so that an action of debt will lie upon it and it will create an estoppel and a merger in another state, if the court that rendered it had jurisdiction. The same rule holds as between the national and the state courts.

Decrees in rem.

A decree of a court of admiralty in an action *in rem* is recognized as binding and conclusive in all countries, if the court had jurisdiction of the *res*.

PART THIRD. CRIMINAL LAW.

CHAPTER LXXIV.

CRIMES IN GENERAL.

1143. Crimes are divided into treason, felonies and misdemeanors. Treason comprises a few crimes directly against the government, which will be described in the next chapter. Felony includes all crimes except treason which at common law were punished with death and forfeiture of the offender's land and goods and involved corruption of his blood, together with such as have been from time to time declared by statute to be felonies. There is no general definition of felony; the various kinds of felonies must be separately learned. Most serious crimes belong to this class. A misdemeanor can be defined only negatively as any crime which is not treason or felony, including most petty offences and some, chiefly statutory crimes, of a more grave nature.

Treason.

Felony.

Misdemeanor.

1144. Crimes overlap upon each other to a considerable extent, so that the same act may amount to two or more different crimes, or one crime may be included in another. Thus murder includes an assault with intent to kill, which in turn includes a simple assault; and robbery includes theft; it being impossible to commit the greater crime without at the same time committing the lesser one. By modern statutes many crimes are divided into degrees according to the presence or absence of circumstances of aggravation, the higher degrees being more severely punished; for instance, murder in the first degree is now usually punished with death, but murder in the second degree is not. Sometimes the higher degrees of a crime are felonies while the lower degrees are only misdemeanors. Every crime of a higher degree includes all lower degrees of the same crime. When a person is prosecuted for a crime, if the very offence for which he is prosecuted can not be proved against him, he may, if the evidence is sufficient for

Overlapping of crimes.

Degrees in crimes.

Conviction of a different crime from the one charged.

that purpose, be convicted of any other crime which is included in the former crime or of any lower degree of the same crime, but not of any higher degree or of any distinct and separate crime not included in the original charge. Thus if a person is prosecuted for murder in the second degree, he may be found guilty of an assault with intent to kill, but not of murder in the first degree or of robbery.

The rule against putting twice in jeopardy.

1145. When a person has once been tried for a crime and convicted or acquitted of it, or if he has been placed on trial so that he might have been convicted or acquitted and the prosecution has been discontinued without his consent, he can never be prosecuted again for the same crime or for any greater crime that includes it. For instance, if A has been tried and convicted for assaulting and wounding B, and B afterwards dies of the wound, A can not be prosecuted for murder. This is expressed in the rule, which is embodied in the constitution of the United States and those of the states, that a person shall not be twice put in jeopardy for the same offence. Its object is to prevent the government or the police from harrassing a citizen by repeated criminal prosecutions, which has been a favorite device of tyranical governments to annoy persons who have incurred their enmity or to silence political opponents. But this rule does not prevent an appeals or the granting of a new trial at the request of the defendant for errors in a criminal prosecution; nor would it apply to a case where a person having committed a serious crime should fraudulently procure himself to be convicted of a trifling offence embraced in it for the purpose of barring a prosecution for the greater crime; fraud makes all juristic acts voidable. However if an act which is a contempt of court amounts also to some other sort of crime, and the party is summarily punished by the court for his contempt, he may also be prosecuted for the crime. And in the United States if the same act is a crime against the national government and also against a state, or against two states, it may be punished by both; but in practice this is not often done.

New trials and appeals.

Double punishment for contempt.

Crimes against two governments.

Mens rea.

1146. Generally a culpable intention, *mens rea*, is necessary to a crime. Therefore a mistake of fact may excuse an act which would otherwise be a crime, as if a man, mistaking one

of his own family for a burglar, should kill him in circumstances where he would have a right to kill a burglar. But a person is not excused because he is ignorant of the rule of law that forbids his act, for example if a person should intentionally kill another to protect himself against an insult by the latter or because the latter had committed adultery with his wife, wrongly supposing that the law permitted him to do so. To this extent at least the principle applies: *ignorantia juris neminem excusat.* If however the ignorance is of a collateral rule of law upon which the legality of the act indirectly depends, perhaps the rule is different. If for instance a man having, as he supposes, obtained a divorce from his wife from a court which had legally no power to grant a divorce, so that the divorce was entirely void, should marry another woman, perhaps the second marriage might not amount to a crime, because of the party's ignorance of the invalidity of the previous divorce. However every person is at least *prima facie* presumed to know the law; and it has been held that in cases of crime this presumption is conclusive not only as to the rule that directly forbids the act, but as to all rules of law upon which its legality even indirectly depends. But as to the latter rules there are contrary decisions.

Ignorance of law.

Crimes without *mens rea.*

But in some cases culpable intention is not necessary to a crime. Thus in a prosecution for abducting a girl under sixteen years of age, which was a crime by statute, it has been held to be no excuse that the defendant supposed her to be over that age. Here simple intention was enough to make the act criminal.

Negligence.

And sometimes a crime may be committed by mere negligence, without any intention at all; it is generally a crime to kill a person by negligence. Also if a person is engaged in committing a crime which is *malum in se,* and some injurious consequence follows which he did not forsee or intend, such as the death of a man, he is usually responsible criminally for such consequences; but not if the act is merely *malum prohibitum,* as if a person who under the game laws has not the right to kill game, in doing so accidentally shoots a person.

Unintended consequences of conduct.

Compulsion as an excuse.

1147. Compulsion will sometimes excuse an act which would otherwise be a crime. Unlawful compulsion by threats of present death or serious bodily harm, but not of injuries to property,

reputation or pecuniary condition or of future personal injuries, if the compulsion be such as an ordinarily reasonable and courageous man would yield to, will excuse any act which is merely *malum prohibitum*, for instance smuggling, and also the giving assistance to public enemies, rebels or riotors, and probably also mere offences against property, or reputation, mental security or pecuniary condition and trifling injuries to bodily security; but it will not excuse the killing or maiming of an innocent person or the rape of a woman. A person should rather face death himself than by his act inflict such wrongs as these last upon another. Nor may a person steal or injure another to satisfy his own needs however pressing.

Relief of one's own needs.

1148. A person who actually commits a crime by his own personal act or omission is a principal in the first degree. One who is present at the commission and, himself sharing in the unlawful intent, aids, abets or encourages the actual perpetrator, though not himself doing anything which would be criminal in itself and apart from its connection with the act of the other, is a principal in the second degree; for instance if one man commits a robbery while another keeps watch at a convenient distance. The punishment of principals in the first and second degree is usually the same, but not always.

Principals.

An accessory to a crime is one who does not himself commit it nor is present at its commission, but is in some way concerned therein either before or after the act.

Accessories.

An accessory before the fact is one who intentionally aids, procures, counsels or commands the commission of a crime without being present at its commission. But if a person counsels another to commit a crime and a different crime is committed, the former is not an accessory; though he is, if the crime which he advised is committed in a different way from what he intended. Thus if A hires B to maim C, and B intentionally kills him, A is not an accessory to the killing, but if in attempting to maim him he accidentally kills him, or if, having been directed to poison C, B stabs him to death, A is accessory to the crime.

Before the fact.

An accessory after the fact is a person who, a crime having been committed and he having knowledge of it, intentionally harbors, relieves or assists the felon for the purpose of helping

After the fact.

him to escape justice, for example by furnishing him with th means of flight, concealing him from the police, forcibly rescuin him when arrested, or aiding him to break jail. But charitabl offices to a prisoner in jail or even to a person out of jail wh is known to be a fugitive from justice, if the motive is actuall pure charity and the relief is limited to the supply of his im mediate bodily wants, *e.g.* giving food to a starving man to sav his life, does not make one an accessory to his crime at commo law. Nor does the purchase or receipt from him of stole goods knowing them to be stolen, the motive being to acquire th goods, not to assist the felon; but this is a separate offence Mere silence also and doing nothing, not volunteering informatio to the public authorities of a crime or the whereabouts of criminal of which a person has knowledge, will not constitute hin an accessory no matter what the motive of his conduct is. Eve the nearest relatives are not permitted to aid each other to escap justice. A father may become in this way an accessory to hi son's crime, or a servant to his master's. But a wife is excepte from the rule, because of her duty to her husband and her bein supposed to be under his coercion.

Acts of charity.

Receipt of stolen goods.

Mere silence.

The offender's family.

Punishment of accessories.

Generally, but not always, the punishment of an accessory i the same as that of a principal. At common law an accessory unless tried at the same time with the principal, could not b put upon trial until the principal had been convicted; but that i not now the rule. If a man were prosecuted as an accessory an acquitted, he could still at common law be prosecuted as principal; whether having been ouce acquitted as a principal h could afterwards be tried as an accessory was doubtful.

No accessories in treason or misdemeanors.

In the crime of high treason and in all misdemeanors ther are no accessories, but all parties concerned are regarded a principals. And in many places the same rule has been i modern times applied to all crimes and the distinction betwee principals and accessories abolished.

Common law and statutory crimes.

1149. Some crimes are defined and forbidden by the com mon law, and are called common law crimes. Others, known a statutory crimes, have been created by various statutes ancie and modern. In some of the United States complete crimin codes have been enacted by the legislature, prescribing what ac

Criminal codes.

shall be deemed crimes. In those states there are at present no common law crimes, though for explaining the meaning of the code when that is doubtful common law principles are often resorted to. Crimes against the national government are all statutory, defined by acts of Congress, the United States having no common law of crimes. But this does not apply to the territories.

Crimes against the United States.

CHAPTER LXXV.

CRIMES AGAINST THE PUBLIC.

1150. It is impossible in an elementary book like this even to mention all the kinds of acts which the law regards as crimes. Only the more important ones can be touched upon.

Crimes against the public and against individuals.

Although all crimes, as distinguished from civil injuries, are considered to be offences against the public rather than against individuals, yet there are certain ones which more directly effect the public and cause violations of private rights only indirectly or not at all, or in which at least the violation of private rights is not the most important element, while in others the very gist of them is a violation of a private right. The former kind will be discussed in this chapter and the latter reserved for the next. At the same time it must be observed that all classifications of crimes are more or less arbitrary and imperfect, and there is no authoritative or generally recognized scheme of arrangement. Some crimes which in the present discussion will be put under one class or sub-division might perhaps be as well put under another.

I. CRIMES AGAINST INTERNATIONAL LAW AND FOREIGN STATES.

Piracy.

1151. Piracy *jure gentium* is any act of depredation upon the high seas which if committed on land would be robbery. It is not settled whether persons cruising at sea for the purpose of robbery but who have not yet committed any act of piracy are pirates. A pirate is *hostis humani generis*; so that, although in general each nation has jurisdiction on the high seas only over its own vessels and persons and things on board of them, any nation may capture a pirate and try and punish him according to its own laws without regard to his nationality. At common law piracy committed by a subject was deemed treason, as being a breach of his allegiance, but by an alien was only a felony. At present all piracies are felonies. Formerly trials for piracy were conducted in the courts of admiralty, but as those courts

had no jury and it was thought improper to inflict the punishment of death without the verdict of a jury, the jurisdiction has been transferred to the common law courts. In the United States it belongs to the national courts exclusively.

Statutory piracies.

By statute various offences have been made piracy which are not such by the law of nations, such as committing hostilities against one's own countrymen under color of a commission from a foreign power, assisting pirates or enemies or dealing with pirates. But for such crimes a nation can punish only its own citizens or subjects; it has no jurisdiction over foreigners, unless he acts are done on its ships.

Slave trade.

The slave trade is not piracy *jure gentium*, and indeed only a short time ago was a lawful business. But now in England and the United States it is piracy by statute, and also by treaty between those powers either one is entitled to treat the citizens or subjects of the other caught engaging in that trade as pirates.

Breaches of neutrality.

1152. When two nations are engaged in war, the governments of other states, if they intend to preserve their neutrality and not to become parties to the war, ought by international law to refrain from giving any assistance to either belligerent, and also, as it was laid down in the arbitration between the United States and England about the American claims for depredations by the Alabama and other cruisers which the Confederate government procured in England, to use due care to prevent hostile expeditions from being fitted out in its territory against either of them. But the law of nations does not lay similar restrictions upon individuals. By that law any citizen or subject of a neutral state is at liberty to enlist in the military or naval service of a belligerent or to sell to a belligerent government ships or munitions of war or to lend it money.

Rights of individuals.

Neutrality and foreign enlistment acts.

However, in order to prevent complications with foreign powers, statutes known as the neutrality acts or foreign enlistment acts have been enacted in both the United States and England, forbidding the preparing or dispatching hostile expeditions against a foreign state, the enlistment of men in the country for participation in a war between two foreign nations, the going abroad or carrying others abroad for the purpose of enlistment in a foreign war, and various other acts likely to embroil the country with foreign

powers. Trade with belligerents, even in munitions of war, is no however forbidden; except that, it being difficult in practice t distinguish between selling an armed vessel and fitting out a hostile expedition, furnishing ships for the naval or military servic of a foreign state which is engaged in war is prohibited.

Blockade running and contraband of war.

Breach of blockade and trading with a belligerent in good which are contraband of war are not crimes, but merely expose the ships or goods to capture and condemnation by the belligerents.

II. Crimes against the state.

Treason.

1153. Treason (*proditio*) involves treachery or disloyalty towards a state to which the party owes some sort of allegiance. It can therefore be committed only by a citizen or subject of the state or by an alien who, being within the borders of the state and under its protection, owes it for the time being a kind of temporary allegiance; not by an alien in a foreign country.

High and petty treason.

Treason against the state was formerly called high treason to distinguish it from certain aggravated offences against individuals which were known as petty treason. But there is now no crime of petty treason; so that high treason and treason are synonymous.

The old law.

In ancient times the crime of treason was not well defined, and the government in England sometimes took advantage of that fact to put its political opponents out of the way or harrass them by charges of treason based upon frivolous grounds, which was inconsistent with the security and liberty of the subject.

The statute of treasons.

Therefore in the reign of Edward III the statute of treasons was enacted, which limited the crime to the following seven cases.

Compassing the death of the King.

(1) Compassing or imagining the death of the King, the Queen or their eldest son and heir. But a mere wish or design, concealed in the party's own breast, is a thing of which the law takes no notice. To amount to crime the design must be manifested by some overt act of preparation, attempt or publication in writing or print. It was held in some old cases that mere spoken words imputing such a design were enough; and in certain instances this was pushed by subservient judges to an absurd and cruel extent. It was afterwards settled, however, that mere spoken

words will not make a person guilty of this crime, unless they refer to some treasonable project actually on foot.

(2) Violating the chastity of the Queen, the King's eldest daughter, being unmarried, or the wife of his eldest son and heir; the tendency of such acts being to cast doubt upon the succession to the crown. Debauching the Queen *etc.*

(3) Levying war against the King within his realm. This means war in the strict sense, and not mere rioting or tumult; the line between the two however is not always easy to draw. But war for any purpose is treason, *e.g.* as a means of bringing about a reform in the government. Levying war.

(4) Adhering to the King's enemies within the realm and giving them aid and comfort by overt acts, such as giving them intelligence or furnishing them with arms or provisions. Enemies are persons carrying on war, not rioters, or robbers. Adhering to enemies.

(5) Counterfeiting the great seal of the kingdom or the King's privy seal. Counterfeiting seals.

(6) Counterfeiting the King's money or bringing into the kingdom such counterfeit coin made abroad with intent to utter it, *i.e.* use it as money, within the realm. But it was not treason under the statute to counterfeit foreign coin. Counterfeiting coin.

(7) Wrongfully slaying the Lord Chancellor or any one of certain judges mentioned in the act. Killing the Lord Chancellor *etc.*

1154. In later times many other acts were made treason by various statutes, some of them being mere extensions of the principle of the act of Edward III to analogous cases and others creating entirely new species of treason, the most important of which latter were those directed against papists during the struggles between Protestantism and Romanism after the reformation, and those intended to secure the protestant succession to the crown in the house of Hanover. Most of those statutes have since been repealed, and at present high treason in England is confined nearly within the limits of the statute of treasons, excluding the provisions against counterfeiting. There is also in England a class of felonies comprising various offences against the King and royal family and the offence of inciting to mutiny in the army or navy, which are known as treason-felony, because of their resemblance to treasonable acts. Later statutes. The present English law. Treason-felony.

The American law of treason.

The constitution of the United States declares that treason against the United States shall consist only in levying war against them or adhering to their enemies and giving them aid and comfort. Most of the state constitutions contain similar provisions. Treason may be committed against either the national government or a state.

Praemunire.

1155. *Praemunire,* so-called from the words *praemunire facias* contained in the writ employed in the prosecution of the offence, is a name that was formerly given to a group of crimes the essential element in which was the setting up or attempting to set up in the realm some foreign or usurped authority. The original conception of such a crime was a result of the struggle between the King and the Pope for the control of the English church and its revenues, which went on most of the time from the Norman conquest to the reformation. By many statutes, of which the most important was the so-called statute of *praemunire* of Richard II, various acts in support or recognition of the Pope's authority in England were made crimes. After the reformation a considerable number of acts which were considered to partake of the nature of usurpations, but which otherwise had nothing in common, were brought by sundry statutes under the head of *praemunire*.

Statute of praemunire.

Sedition.

1156. Sedition is a somewhat vague term covering attempts by acts or words to bring into hatred or contempt or excite disaffection against the sovereign, the government or the administration of justice, to bring about changes in the government or laws by unlawful means, to incite to the commission of crimes in disturbance of the public peace, to raise disaffection in the community or foment ill-will or hostility among different classes of the people. It does not include criticism or censure of the acts of the government or of any public officer, even unfair, ignorant, intemperate or abusive criticism or censure, provided that does not amount to libel or slander; freedom of speach is one of the most important rights of the citizen and an essential support of civil liberty. Nor is it seditious to oppose the policy of the government by any lawful means, however offensive to the persons admin-

Opposing the government.

[1] *Praemunire* is law Latin for *praemoneri.*

istering the government, or to agitate and work by peaceful and lawful means for the accomplishment of any reform or change in the government or the laws however radical. For instance a newspaper was for some time published in New York to advocate the abolition of the republican form of government in the United States and the substitution of an empire. That was not a seditious publication. There is no separate and single crime of sedition; it is a name for a class of crimes or for all crimes committed with a seditious intent. It is sometimes understood to include treason, but is generally confined to offences that fall short of actual treason. The particular acts that amount to crimes under this head are now defined by statute.

Misprision

1157. Misprision, from old French *mespris*, is a name applied to various misdemeanors of a serious nature which more directly affect the government. It may consist in omission or commission.

Misprision of treason and felony

Misprision of treason or felony is where a person knows that such a crime has been committed and wilfully conceals the fact instead of promptly giving information, as he ought to do, against the offender.

Contempts.

Positive misprisions are generally denominated contempts. They include acts of maladministration by public officers and criminal contempt of court, which will be spoken of further on, and in England various minor offences against and insults to the person of the sovereign, by acts or words, which last are also known as the crime of lese majesty.

Counterfeiting.

1158. Counterfeiting the national money or national securities, or having such counterfeits in one's possession with intent to utter or unlawfully use them, is a felony, and so are certain other acts tending to debase the coin, such as clipping or sweating coins. Counterfeiting foreign money or securities is also a crime in most places.

Crimes against the elective franchise.

1159. Wilfully voting or attempting to vote at an election by a person who has no right to vote, or voting or attempting to vote more than once at the same election, fraudulent registration, *i.e.* fraudulently procuring the name of a person to be placed improperly upon the list of voters, ballot-box stuffing, *i.e.* fraudulently putting ballots into the box which ought not to go in,

preventing by force or intimidation a legally qualified voter from casting his vote, unlawfully taking out of the ballot-box ballots that have been lawfully cast, fraudulent miscounting of the votes or wilful false returns by election officers, and other improper practices militating against the purity and freedom of elections are crimes, usually misdemeanors.

III. Crimes against religion.

Christianity.

1160. It used to be said that Christianity was a part of the common law, and various acts were formerly punished as crimes for religious reasons.

Apostacy and heresy.

Apostacy, *i.e.* the abandonment of the Christian religion and taking up some other belief or becoming an atheist, and heresy, *i.e.* professing religious opinions which the law declared to be erroneous, were formerly crimes, but are no longer so, complete religious liberty being now established. These offences were triable in the ecclesiastical courts, which proceeded against the offender *pro salute animae.*[2] But besides the ecclesiastical penalties which those courts could inflict, the heretic might be further punished with death by burning at the King's pleasure, for which purpose, after a conviction in the ecclesiastical courts, the King in Council might, if he saw fit, issue a writ *de heretico comburendo.*

Witchcraft

1161. Witchcraft in ancient times was a felony; but there is now no such crime, intelligent people generally having ceased to believe in its possibility.

Blasphemy.

1162. Blasphemy is speaking or writing against the essential doctrines of the Christian religion, using insulting or opprobrious language toward the Deity or profane cursing and swearing, and in ancient times was a serious crime. Some forms of it are still misdemeanors in some places, on the ground of being extremely offensive to the feelings of most people; but the law is very seldom enforced, never against a person who expresses his opinions on any subject in good faith and in a decent manner.

Sabbath breaking.

1163. Statutes forbid labor, except works of necessity or

[2] See § 1122.

mercy, and certain kinds of amusements on Sunday. The violation of these is called sabbath breaking. These laws are based partly on religion, but at present are usually defended on the ground of the importance of securing to the community a day of rest and of preserving the orderliness and quiet of Sunday. They are not very strictly enforced.

IV Crimes against decency and morality.

Bigamy

1164. The word bigamy was formerly used to denote the marrying another husband or wife after the death of a former one. This has always been perfectly lawful, though regarded by many persons with disfavor. In the legal sense bigamy or polygamy means the marrying another husband or wife by a person who is already married, or marrying a person who is already married. The second marriage is of course void; but each party to it is guilty of a crime, provided he or she knows the facts that make the second marriage void, *i.e.* the existence of the former marriage and that the former husband or wife is still living and not divorced *a vinculo*. But if a man mistakenly supposing his former wife to be dead should in good faith marry again, although the second marriage would be void, it would not be criminal.

Incest.

1165. Incest is sexual intercourse, with or without having previously gone through a form of marriage, between persons who are so nearly related that they can not marry.

Sodomy.

1166. Sodomy, also called buggery or the crime against nature, covers various unnatural modes of copulation, *e.g.* *per anum* or *per orem*, or sexual intercourse with a beast.

The three above mentioned crimes are felonies.

Adultery, fornication and prostitution.

1167. Adultery, *i.e.* sexual intercourse between a married woman[3] and a man who is not her husband, fornication, *i.e.* sexual intercourse between an unmarried woman and any man, and prostitution were not crimes at common law on the part of either the man or the woman, though they exposed both of the offenders to a fine or to spiritual penalties in the ecclesiastical

[3] In the law of divorce adultery means unlawful sexual intercourse by either husband or wife.

courts. At present adultery in most places and fornication in a few of the United States are misdemeanors, though not often punished.

Seduction. Seduction, however, which is where a man by artifice or persuasion induces a woman previously chaste to have unlawful sexual intercourse with him, particularly if the seduction is accomplished by means of a promise of marriage which is not kept, is a statutory

Prostitution. crime. Prostitution is not a crime except in those places where fornication is.

Open lewdness. **1168.** Open and notorious lewdness, which tends to public scandal, is a misdemeanor at common law. It includes such acts as frequenting bawdy-houses, the solicitation of men in the street by prostitutes, having or begetting bastard children, and by statute most acts of gross indecency in public, for instance

Abortion. indecent exposure of the person. Procuring an abortion is a statutory crime.

Drunkenness. **1169.** It is not unlawful to get drunk; but being drunk in a public place, *e.g.* in the street, is a misdemeanor.

Violating graves. **1170.** It is a crime to violate a grave and carry off a dead body without a permission from the proper authorities.

V. Crimes against the peace.[4]

Breach of the peace. **1171.** All unlawful acts of violence and disorder are called breaches of the peace. Very many crimes, for instance murder and robbery, involve breaches of the peace; but mention will be made here only of certain ones in which that is the most prominent element.

Unlawful assembly. **1172.** An unlawful assembly is an assembly of three or more persons with the intent to commit a crime by open force or to carry out any common purpose, lawful or unlawful, in such a manner as to give reasonable grounds to apprehend a breach

Rout. of the peace in consequence of it. A rout is an unlawful assembly which has made a motion toward the execution of their common purpose.

Riot. A riot is an unlawful assembly which has actually begun to execute its purpose, or an assembly of three or more

[4] See § 99.

persons originally lawful which has taken up and begun to execute an unlawful purpose, by a breach of the peace and to the terror of the public.[5] Thus if a hundred armed men meet together for the purpose of tearing down a liquor saloon, this is an unlawful assembly. If they march out together from the place of meeting toward the building, this amounts to a rout. If they actually pull down the building with violence and disorder, they make a riot.[6]

Affray.

1173. An affray is fighting in a public place, so as to cause a breach of the peace; for instance a prize fight. A fight in a private place is an assault merely. If more than two persons are engaged, an affray may amount to a riot.

Disturbance of meetings.

1174. Unlawfully disturbing any lawful meeting, for instance going to a political or religious meeting and making a disturbance, is a crime. Forcible entry and detainer has been already mentioned;[7] it is in some places a crime.

Forcible entry and detainer.

Acts tending to cause breach of the peace.

1175. Besides acts such as those above described which amount to an actual breach of the peace, there are others which are treated as crimes because of their tendency to cause one. Challenging or provoking another to fight, sending threatening letters for purposes of blackmail or annoyance and criminal and seditious libels, which will be spoken of in the next chapter are examples of such acts.

Carrying weapons.

1176. The practice of carrying weapons naturally leads to broils and killings. In civilized society men are expected to depend upon the law for protection. Therefore going about armed or, as it is more often called in the United States, carrying concealed weapons is generally forbidden, except in certain cases where it is allowed for special reasons. The weapons need not be in the proper sense concealed; the rule is the same if they are openly displayed. The provision in the constitution of the United States, that the right of the people to keep and bear arms shall not be infringed, has been decided by the courts to refer to the arms of a soldier or militiaman, and not to confer any right to carry around revolvers and bowie knives.

Constitutional provisions in the United States.

Misdemeanors.

1177. All the crimes in this sub-division are misdemeanors.

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[5] Stephen, Dig. of Crim. Law, Art. 70–72.

[6] Harris, Crim. Law, 105.

[7] See § 461.

VI. Crimes against the public health, order and well being.

Police regulations.

1178. Breaches of regulations intended to protect the public health and prevent the spread of contagious diseases, or selling or keeping with intent to sell provisions which are spoiled and unwholesome or adulterated are misdemeanors. So is knowingly and wilfully spreading false and alarming news to the disquietude of the community, as when some years ago a newspaper in New York, merely to perpetrate a hoax, published a false report that the lions and other dangerous beasts in the zoological garden in that city had all escaped from their cages and were roaming at large in the adjacent streets, thus causing anxiety to the parents of children who were attending school in that part of the city and to other persons who had occasion to go there, or if false stories of difficulties with foreign nations likely to result in war should be at afloat to affect the stock market.

False reports.

Vagrants.

1179. A vagrant, or as he is more often called at present a tramp, is a person who, having no regular occupation and no visible means of support, wanders about from place to place begging or committing depredations; but not a laboring man going about in good faith in quest of work, even though he may be unsuccessful in finding it and may be occasionally obliged to accept charity.

Disorderly persons.

Disorderly persons include vagrants and also paupers who refuse to comply with the regulations laid down by law for their government while they continue to be dependent upon public charity, beggars, hawkers and peddlers who have not taken out the licenses to carry on their trade required by law, and generally persons doing business without a license when the law requires one, prostitutes behaving in a disorderly or indecent manner in public, and various other classes of persons who make themselves objectionable to the community in analogous ways or from their manner of life are likely to commit crimes or depredations.

Rogues and vagabonds.

Rogues and vagabonds are disorderly persons who persist in being such after having been once convicted, and also those who in addition to mere idleness and vagrancy actively annoy the

public or commit various acts injurious to others or practice impostures upon ignorant or charitable people, such as fortune tellers, beggars who expose wounds or deformities to excite pity or who collect alms on false pretences, persons who exhibit indecent pictures or objects or make indecent exhibitions of their persons in public, or who run away leaving their wives or children chargeable to the public, or who have burglar's tools or apparatus for swindling in their possession, and persons of like sort.

Statutory provisions.

The kinds of conduct which will put a person into any one of those classes are in most places defined by statute, though a part of the ground is covered by common law rules. It is impossible to descend to details here, especially as the statutes differ somewhat in different place. All such persons are guilty of misdemeanors, though some species of vagrancy were felonies at common law, and in some of the United States, owing to the recent increase of tramps and the many crimes committed by them, the laws against them have been made more severe and they are punished with confinement in the state prison.

Misdemeanors.

Tramps.

Gambling.

1180. Gambling is not by itself a crime; but certain kinds of gambling in public are reckoned as disorderly conduct, for example in some of the United States gambling in railroad trains and passenger steamers, where professional gamblers and sharpers are accustomed to resort to swindle unwary travellers.

Sumptuary laws.

1181. In former times legislators thought it expedient to pass somewhat strict laws to check extravagance in dress and living among the people. Those were known as sumptuary laws. They are now all repealed, such matters being wisely left to the private judgment of each individual.

Nuisances.

1182. The word nuisance as has been explained elsewhere, denotes either a thing or a wrong. The same kinds of things which were mentioned in §§ 706-708 as nuisances are also nuisances for the purposes of the criminal law, provided they are public nuisances, that is, provided they violate or threaten to violate the rights of the public or of a large and undefined number of persons and not merely of specific individuals. Besides those, the criminal law treats as nuisances many things which, although they do not actually violate or have any tendency to violate any one's rights, are injurious or unreasonably annoying to the public either in

themselves or from the way in which they are used. Among such things may be mentioned bawdy houses, disorderly inns or taverns, gambling houses, lotteries, unlicensed theaters, places of public amusement and liquor saloons when the law requires these to be licensed. It is generally a misdemeanor wilfully to create or maintain a public nuisance, or to omit to abate it when a person has possession of it and the right to abate.

Nuisances not caused by things.

There are also certain acts which, because they cause annoyance or harm to the public or to a large part of the public, are regarded as criminal nuisances, though they are not committed through the instrumentality of any particular kind of thing, for instance keeping a corpse unburied for an unreasonably long time, making great noise in the street at night, or eavesdropping, that is, "listening under walls or windows, or the eaves of a house, to hearken after discourse, and thereby to frame slanderous and mischievous tales." A common scold, *communis rixatrix*, is a woman, for the law presumes that a man can not be guilty of this offence, who habitually goes about scolding and quarreling. She is guilty of a public nuisance, for which formerly she was liable to be punished by being ducked in a pond by means of an instrument known as a cucking stool or ducking stool.

Eavesdropping.

Common scolds.

VII. Crimes against public justice.

Injuring public records.

1183. Unlawfully removing, destroying, mutilating, falsifying or forging public records is a serious crime, usually a felony.

Obstructing service of process.

1184. Obstructing the service of legal process by force or fraud is a crime; but a person may by force exclude from his dwelling house an officer who is attempting to enter to serve process, except where the officer has a right to enter as explained in § 737. In case of civil process the offence is a misdemeanor; but the obstruction of criminal process makes the wrongdoer *particeps criminis*, an accessory in felony, a principal in treason or misdemeanor; such at least was the common law rule. When an officer, meeting with forcible resistence in the performance of his duty, calls upon any able bodied man who is capable of serving in the *posse comitatus*[8] for help, it is a misdemeanor in the latter to refuse.

Refusing to assist an officer.

[8] See § 1157.

Escape.

1185. When a prisoner lawfully arrested or confined is wrongfully liberated by himself or others without force, it is called an escape; when the liberation is affected by the party himself by force, it is forcible escape or, if from prison, prison breach; when it is affected by others with force, it is known as *rescuous* or rescue. The prisoner who escapes and all persons who aid him are guilty of a crime, which may be felony or misdemeanor. An officer who voluntarily or negligently permits the escape of a prisoner charged with a crime, is guilty of a misdemeanor; but if the prisoner has been convicted of a felony or after his escape is recaptured and convicted of the same felony for which he was originally arrested, the officer, if the escape was voluntary on his part, becomes also guilty of the felony. An escape of a prisoner held on civil process is not a crime on the part of the officer, but a tort[9].

Prison breach.

Rescue.

Liability of officer.

Compounding crimes.

1186. A private person is not bound to set on foot a prosecution against a criminal, though in case of treason or felony he is bound to give information of it.[10] But an agreement for a reward not to prosecute, for instance an agreement not to prosecute a thief if he will restore the stolen goods, is called compounding the crime or, in the case of compounding with a thief, theft-bote. Compounding treason or felony was a crime at common law, and anciently made the party an accessory to the felony, but at present is a misdemeanor. To compound a misdemeanor was not unlawful by the common law, but now in most places is a statutory misdemeanor.

Felonies.

Misdemeanors.

Barratry.

1187. Common barratry or barretry is the habitually exciting and stirring up quarrels and lawsuits in the community; not the doing so once or on a few occasions, but the making a practice of it.[11]

Maintenance

1188. Maintenance is the officiously intermeddling in a law suit in which one has no concern by assisting either party with money or otherwise; but a man may maintain the suit of his near kinsman, servant or poor neighbor out of charity and compassion with impunity; and for a lawyer, the maintenance of suits is his professional duty.

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9 See § 1019. 10 See § 1157.

11 For another meaning of barratry, see § 839.

Champerty.

Champerty (*campi partitio*) is a species of maintenance, being an agreement with a plaintiff or defendant *campum partire*, to divide the land or other property sued for between them, if they prevail at law, whereupon the champetor is to carry on the suit at his expense. It also includes the purchasing claims or land of which the title is in dispute, which is called buying or selling pretended titles, with the intent that the buyer shall prosecute a suit on the claim or for the land instead of the seller. It is often said that the prevention of champerty was the reason or one of the reasons why at common law *choses* in action and bare rights to land[12] were not permitted to be assigned; but perhaps that is a case of the invention of a new reason for an old rule whose original ground was different.

Buying pretended titles.

The modern law.

1189. Barratry, maintenance and champerty were common law misdemeanors; but in modern times maintenance and champerty are either not crimes at all or are confined to a few cases where for special reasons such practices are particularly objectionable, such as selling and buying pretended titles to land or the purchase of claims by attorneys for the purpose of suing upon them. The purchase and sale of choses in action is now generally lawful.

Perjury.

1190. Perjury, often called wilful and corrupt perjury, is committed when, a lawful oath having been administered in some judicial proceeding, or by statute in modern times in some proceeding where the law requires an oath to be taken, the person taking the oath thereupon wilfully swears falsely as to a point material to the matter in hand. False swearing in a case where the law does not require an oath is not perjury, though it may amount to a fraudulent misrepresentation, as where an insurance policy provides for a sworn statement of the particulars of a loss being furnished by the insured to the underwriter. A culpable intention is essential to the commission of the crime; a person, for instance a witness testifying in court or a party making an affidavit in a proceeding, is not guilty of perjury if he makes a false statement by mistake believing it to be true; but a person may commit perjury by making a positive false state-

[12] See § 449.

ment about a matter as to which he has no knowledge or belief at all, and in some cases by statute by making positive false statements in affidavits as if from his own personal knowledge when in fact he is merely speaking from hearsay

Subornation of perjury.

1191. Subornation of perjury is wilfully and corruptly procuring another person actually to commit perjury, not merely an attempt to procure it. Perjury and subordination of perjury and also the offences of falsifying evidence or preventing by force or fraud a witness from appearing or testifying, are sometimes felonies and sometimes only misdemeanors.

Falsifying and suppressing evidence

Bribery.

1192. Bribery of a judge, juryman or any officer of the court, or the mere offering of a bribe which is not accepted, is a grave crime. Embracery is an attempt to influence a jury corruptly by bribes, gifts, entertainments, promises or even persuasion or entreaty. These offences both on the part of the person offering the bribe or using the improper influence and the judge, juryman or officer who actually accepts or yields to it, may be either felonies or misdemeanors.

Embracery.

False verdict.

1193. A false or incorrect verdict by jurors was in ancient times assumed to be due always to embracery or fraud, and was therefore a crime, which was punishable at the instance of the injured party by a peculiar proceeding called an attaint, in which the same issue that had been tried before the original jury was tried over again before a jury of twenty-four men, the law not deeming it proper that the verdict of one jury of twelve should be attainted by that of another jury of the same number. No evidence could be given on the second trial except what was given on the former one, the very question to be decided being whether the first jury did rightly upon the evidence which they had before them. If the former verdict was found to be false, it was set aside and the jury punished. But in modern times the writ of attaint has been abolished, it being considered that the exposure to punishment for a wrong verdict is inconsistent with the proper independence of the jury; and an erroneous verdict which can be shown to be due to any actual misconduct or gross misapprehension on the part of the jury can be set aside on a motion for a new trial.

Attaint.

Contempt of court.

1194. Criminal contempt of court includes various acts

tending to interfere with the administration of justice in the courts or to bring the courts themselves into disrespect and so undermine their authority.

What acts are contempts.

Disorderly behavior in the place where the court is sitting, such as fighting or making a noise in the court room or insulting the judge on the bench, or such conduct so near thereto as to disturb and interrupt the business of the court; publishing libels upon the court or upon the judges in their judicial capacity or grossly false reports of their proceedings, of a nature to excite hatred or contempt against them in the public mind; abuse of their authority by the officers of the court or of the process of the court by any one for purposes of extortion or malice; attempts to bribe or improperly influence the judge, a juryman or any court officer; resisting or obstructing the service of process or the execution of any order or mandate of the court or disobedience to its orders or writs, are the most important of the acts which when done wilfully are regarded as contempts against the court. Most contempts are misdemeanors. But in

Summary punishment.

any case every court of record has power to punish contempts against itself summarily, without resorting to the ordinary forms of criminal procedure. If the contempt is committed in the actual presence and view of the court, so that the judge has personal knowledge of it while acting as judge, as in case of an affray in the court room or the refusal of a witness to answer a proper question put to him, no trial or proceedings of any kind are necessary, but the court can at once make an order for the punishment of the offender. In other cases the proceedings are substantially the same as in civil contempts,[13] except that the attachment is issued or the order to show cause why an attachment should not issue is made by the direction of the judge himself or upon an information filed by the attorney general and not upon the petition of an aggrieved party. At

Penalty for contempt.

common law for a criminal contempt the court could fine or imprison the offender at its discretion; but at present in many places the maximum punishment that may be imposed is fixed by statute.

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[13] See § 1103.

VIII. Crimes relating to public officers.

Sundry offences.

1195. Falsely assuming to act as a public officer knowing oneself not to be such, preventing or obstructing any public officer in the performance of his official duty by fraud or wrongful force or intimidation, and bribing or attempting to bribe any public officer are crimes of various degrees of magnitude, generally misdemeanors.

Extortion.

1196. If any public officer or person acting as such, in the exercise or under color of exercising the duties of his office, does any illegal act or, from any improper motive and not by a *bona fide* mistake or error of judgment, abuses any discretionary power vested in him, and by that means obtains from any person any money or valuable thing which is not then due to him, he is guilty of extortion, as also if he demands and receives anything which he is not entitled to as a consideration for doing his official duty. Thus it is extortion for a sheriff to obtain money from a party against whose property he has a writ of attachment by threatening to take goods whose deprivation would cause a special loss to the owner when he might equally well take other goods, or to demand and receive more than his legal fees for serving process.

Oppression.

1197. If the illegal act consists in inflicting upon any person any bodily harm, imprisonment or other injury not amounting to extortion, the offence is oppression. Extortion and oppression are misdemeanors.

Misconduct of officers.

1198. Accepting bribes, neglecting or refusing to perform the duties of his office without justifiable cause, and revealing official secrets are also crimes on the part of a public officer, usually misdemeanors.

Malversation.

1199. Improper and criminal conduct by public officers in their official capacity is generally called malversation in office, and comes under the general head of misprision.

IX. Trade offences.

Smuggling.

1200. Smuggling is knowingly importing or attempting to import dutiable goods into the country without paying the duties

Illicit manufactures

prescribed by law. Very similar is the offence of manufacturing excisable articles without paying the excise tax, of which the most common case is the illicit distillation of whiskey and other liquors. These acts are misdemeanors, and besides subjecting the offender to punishment expose the goods themselves to forfeiture on an information *in rem*.[14]

Forfeiture.

Unlicensed trading.

1201. Carrying on any trade for which a license is required without obtaining a license is a misdemeanor, and in the case of selling intoxicating liquors sometimes involves the forfeiture of the goods. The same is true of any selling of liquor in a place where it is entirely prohibited by law.

Fraudulent bankruptcy.

1202. Fraudulent bankruptcy, which is a misdemeanor, also belongs to this class of crimes.

Markets.

1203. Markets, the nature of which has already been described,[15] are intended for the convenience of the dwellers in the neighborhood and not for speculation. There were a number of acts which were made misdemeanors by the common law for the purpose of preventing speculative enhancements of prices in markets, but which are no longer unlawful.

Forestalling.

Forestalling the market was buying or contracting for any merchandise on the way to a market, dissuading the owner from carrying it there or persuading him to raise the price of it.

Regrating.

Regrating was buying corn or any dead victual in a market and selling it again in the same market or within four miles of it.

Engrossing.

Engrossing was getting into one's possession or buying up large quantities of corn or other dead victual with intent to sell them again, the tendency of which was to create a temporary scarcity and thus enhance the price.

X. Conspiracy.

Conspiracy.

1204. Not only does a conspiracy to commit a crime make each conspirator *particeps criminis*, either as principal or accessory, if the crime is actually committed, but the conspiracy itself is a

[14] See § 940.

[15] See § 607.

crime even though it comes to nothing. Also a conspiracy to accomplish a lawful result by unlawful means or to do a wrong to a person which if were committed by an individual would be a mere tort, is criminal. For instance buying goods on credit with an intent not to pay for them was not at common law a crime, but a conspiracy to do so was. The gist of the offence is the combination; a single person can not be guilty of it. Nor is a mere intention to commit a crime a conspiracy, there must be an agreement. If however the conspiracy is actually carried out by the commission of a felony, the conspiracy is merged in the felony, and the conspirators can not be punished for it as a separate crime. Combinations of workmen to raise wages and strikes by workmen for higher wages were formerly regarded as criminal conspiracies, but by recent statutes are not so now unless unlawful means are to be used.

Merger.

Combinations of workmen.

CHAPTER LXXVI.

CRIMES AGAINST INDIVIDUALS.

I. Consent.

Consent.

1205. Generally an act is not a crime against an individual if it is done with the latter's consent. For instance, it is not theft to take another person's property by his permission. But the consent must be freely and understandingly given, not obtained by force or fraud nor from a person who by reason of his tender age or weakness of mind is incapable of understanding the nature of the act. A person however can not consent to his own killing or maiming or to any assault upon him which involves a breach of the peace, as for instance in a prize fight; the consent is void, and will not prevent the act from being a crime. It is doubtful how far a person can consent to acts which put him in great danger of death or serious bodily harm, for example being wheeled in a barrow along a tight rope at a great height from the ground. But surgical operations, however dangerous, may be submitted to, and can be performed upon a young child or insane person with the consent of those in charge of him, and probably upon an insensible person in case of necessity without any consent.

What may be consented to.

II. Crimes against personal security.

Homicide.

1206. Homicide is the killing of a human being by a human being; but the killing a child in *ventre sa mere* is not homicide, though it may be a crime of a different kind. Homicide is justifiable, excusable or unlawful.

Justifiable homicide.

Justifiable homicide is that which is committed in the discharge of a duty, as where a sheriff or his officer hangs a man under a warrant from a court. A peace officer having a right to arrest a person may kill the latter if he forcibly resists the arrest,

and such an officer or a jailor may kill a prisoner who assaults him in a forcible attempt to escape. If however a person on a lawful attempt to arrest him flees instead of resisting, he can be killed to prevent his escape only when the ground of arrest is treason or felony or the infliction of a dangerous wound, not in an arrest for a misdemeanor or on civil process. So an officer lawfully endeavoring to quell a riot may kill a rioter. Quelling riots.

Any person may kill another to prevent the commission by the latter of a forcible felony, such as murder, rape, robbery or burglary; but the prevention of a crime not attended with force, such as theft, or of a simple assault or trespass, although forcible, will not justify homicide. The lawful possessor of a dwelling house or any of his family may kill a wrongdoer who is trying to dispossess him by force. Prevention of crimes. Defence of a dwelling.

1207. Excusable homicide is that which is done in lawful defence, *se defendendo*, or by accident, *per infortuniam*. Excusable homicide.

If a person is unlawfully assaulted in such a manner as to put him in reasonable apprehension of instant death or grievous bodily harm, or is unlawfully assaulted in his own house or in the execution of a duty imposed upon him by law or by way of resistance to the exercise of force which he has a right to employ against the person assaulting him, he may defend himself on the spot, without retreating, even by killing his assailant. In other cases a person wrongfully assaulted may defend himself on the spot by any means short of the intentional infliction of death or grievous bodily harm. But before he proceeds to the latter extremity he must retreat as far as he can with safety to himself; and then if his assailant follows him up and continues the assault, he may go to any length in defending himself. If two persons quarrel and fight, whichever was the aggressor, neither is regarded as acting in self defence until he has fled from the fight as far as he can. A sudden broil or affray is called chance medley or chaud medley. Self defence. Duty to retreat. Killing in fight. Chance-medley.

Whatever may be done in self defence may be done in defence of the person's wife, husband, parent, child, master or servant. Defence of others

Any circumstances which will justify or excuse the taking of life will justify or excuse the infliction of any lesser bodily harm. Injuries less than death.

Excession force.

1208. In all the above mentioned cases no more harm must be done to the wrongdoer than a reasonable and prudent person of ordinary courage in the party's situation would judge necessary for the attainment of the end in view. Killing or inflicting serious bodily harm is never permitted when something less would suffice. Moreover this right to kill or injure another extends only to defence, not to revenge or punishment. If A attacks B and then runs away, and B follows him up and kills him, B's act is a crime, although A was the aggressor.

Force may used only for defence.

Killing an innocent person.

1209. The force also can be used only against the wrongdoer; one may not kill an innocent third person to save his own life. Some of the old books contain *dicta* opposed to this proposition, asserting that where two equally innocent persons are placed in a situation where one must inevitably perish, one may kill the other for his own preservation, as where two shipwrecked persons get upon the same plank and one of them finding it too small to float both pushes the other off and he is drowned. But that is probably not law. It has been held that where persons who had escaped in a boat from a foundered ship, being on the point of starvation, cast lots to see who should be sacrificed to save the rest and killed and ate the person on whom the lot fell, they were guilty of murder.

Accidental killing.

In the course of an unlawful act.

Doing a lawful act improperly.

1210. When a person engaged in doing a lawful act in a careful and proper manner accidentally kills another, the homicide is excused. But if the act is unlawful, as where a person attempting to shoot and steal another's hens accidentally kills a man; or where being lawful it is done in an improper manner, as where a person having a right to punishes another punishes him so immoderately that he dies, a surgeon performing an operation causes the death of the patient by want of reasonable skill or care or one person kills another by careless handling of loaded fire arms, or where it is done by the use of excessive force in self defence; the killing is criminal.

Justifiable or excusable homicide not a crime.

1211. Justifiable or excusable homicide is not a crime; though anciently, it seems, excusable homicide did subject the killer to a milder punishment.

Felonious homicide.

1212. Unlawful or felonious homicide includes all cases where the killing is not justified or excused. It is a felony, and is divided into murder and manslaughter.

1213. Murder (*murdrum*) is unlawful homicide with malice prepense or aforethought. Murder.

Malice aforethought means an intention to kill or inflict grievous bodily harm upon the person killed or any other person, knowledge that the act probably will have that result, *i.e.* recklessness, intent to commit any felony, as where a burglar accidentally kills some one in breaking into a house, or in most cases culpable intent to resist an officer who is executing process or attempting to preserve the peace. The murderous intent may be formed at the instant of the crime, and need not have been premeditated. Murder with premeditation is in most places at present distinguished as murder in the first degree. Any homicide is *prima facie* presumed to be murder, and the burden is on the slayer to prove that it was not. Malice aforethought. Murder in the first degree. Presumption of murder.

1214. Parricide, *i.e.* the murder of a parent, is not a distinct crime; nor is the murder by a parent of his child, which in the case of a newly born infant is called infanticide. These are treated as ordinary murder. Parricide and infanticide.

It has already been said that in England the murder of the King or Queen or certain other high personages is classed as high treason. The law is different in the United States, where the murder of the President or the Governor of a state does not differ in its legal character from the murder of any one else. At common law also the murder of her husband by a wife, a master by his servant or an ecclesiastical person by his ecclesiastical subordinate amounted to the crime of petty treason and was furnished with especial severity. But that law is now obsolete. Murder of public officers. Petty treason

1215. Suicide is reckoned a species of murder. It is of course impossible to inflict any punishment upon the offender himself; but in former times it, like other felonies, involved the forfeiture of the felon's land and goods, and by way of a deterrent to others the body of the *felo de se* was denied Christian burial and subjected to the indignity of being buried at the crossing of two highways with a stake driven through it. But those barbarities are no longer practised. However an unsuccessful attempt at suicide is punishable as a crime, and a person who advises or assists another to commit suicide becomes a party to the crime as a principal in the second degree or an accessory. Suicide. Attempts at suicide. Advising or assisting suicide.

Manslaughter.

1216. Manslaughter is any felonious homicide that is murder. It includes unintentional killings in excessive self de or by any excessive use of force towards another, or in doi attempting to do an unlawful act not amounting to a felon where a person is accidentally killed in a fight; but killing an

Negligent killing.

in a duel is murder. Killing a person by a negligent act is slaughter. And even a negligent omission to perform a

Wrongful omissions.

owed to the person killed or imposed for his benefit for the tection of his bodily security, sometimes amounts to this c Thus a father may be guilty of manslaughter who permits child to die for want of care or medical attendance, o officers or servants of a railroad company who suffer its tra remain in a dangerous and defective condition whereby a is wrecked and a passenger killed.

Provocation.

Intentional killings which fall under the definition of m may sometimes be reduced to manslaughter by being done u some strong provocation, such as is afforded by an assault, a insult or an unlawful arrest or imprisonment. A person who on the spot a man whom he takes in the act of adultery wit wife is guilty of manslaughter only, not of murder. But the vocation must be great, such as would be likely to be too for the self control of a reasonable man, and the killing must f

Time for deliberation.

upon it immediately. If the person provoked has had tim deliberation and for his feelings to cool, the provocation will extenuate his act. Thus if a person is unlawfully attacked beaten, and goes away and gets a weapon and then returns and his assailant, or if a husband or father deliberately kills a man has previously debauched his wife or daughter, that is murde

Mayhem.

1217. Mayhem or maiming meant at common law the cibly and unlawfully depriving a person of any of his men that might be useful to him in fighting, such as a hand, a or an eye, or in case of a man the privy members; but disfigurement, as by cutting off a person's nose or ear, did

Modern law.

amount to this crime. Mayhem was a felony. However by modern law the intentional and wrongful deprivation of any me or the infliction of any serious wound or disfigurement is cri and usually felonious; and negligent woundings generally amou misdemeanors.

1218. Rape, which is a felony, is the having carnal knowledge of a woman forcibly and against her will by any man except her husband. A woman, though personally incapable of committing this crime, may become an accessory or a principal in the second degree to a rape actually committed by another, so may a husband to a rape on his own wife. If consent is obtained by force or threats of immediate death or serious bodily harm, it is void; but if by threats of any other kind, *e.g.* of injury to the woman's property or to her family or of future death to herself, or by fraud, the offence did not amount to rape at common law, but in some cases has been made so by statue. If the female is under the age of consent, that is, at common law the age of twelve years, though by statue in some places it has been raised to fourteen or sixteen years, she is conclusively presumed incapable of consent, and even though she actually consents the man is still guilty of this crime. The slightest penetration, even without emission, is sufficient to constitute carnal knowledge.

Rape.

Consent obtained by force or fraud.

Woman under age of consent.

What is carnal knowledge.

The ancient proceeding for the punishment of this crime was what was called an appeal of rape instituted by the woman herself against her ravisher, to maintain which it was necessary that the woman should immediately after the commission of the wrong have made prompt discovery of it to some credible person and to certain public officers. At present rape is punished by a public prosecution like other crimes, and there is no strict rule of law requiring such discovery. But the fact that the woman did not complain of the injury to the persons to whom she would naturally complain, such as her husband, father or relatives, but concealed the fact, is weighty evidence to show that she consented to the act.

Appeal of rape.

Modern law.

Concealment evidence of consent.

1219. Assault and battery are the same kinds of acts which constitute the civil injuries called by those names,[1] except that the single word assault is generally used in the criminal law to include both. An assault may be a felony or a misdemeanor according to the circumstances in which it is committed or the degree of injury done.

Assault and battery.

Assaults with intent to kill, maim, rob, ravish or commit other crimes, assaults with deadly weapons and indecent assaults

Aggravated assaults.

[1] See § 874.

are distinguished from simple assaults which are without circumstances of aggravation, sometimes as constituting higher degrees of the crime of assault and sometimes as separate crimes.

False imprisonment and kidnapping.

1220. False imprisonment and kidnapping, which latter meant the forcible abduction of a person from his own country and sending him into a foreign country, were crimes at common law. Kidnapping persons to be sold or assigned into *quasi* slavery as indentured servants for a term of years in the American plantations was at one time a common crime in England.

Stealing an heiress.

Stealing an heiress, that is, forcibly taking away and marrying or defiling a woman of substance or who is an heir apparent to property, was made a felony by a statue of Henry VII. At present all wrongful and forcible abductions of persons, and also inviegling girls into brothels by deceit or persuasion and similar offences, are crimes by statute, and the name kidnapping is generally applied to them.

Abduction.

Libel.

1221. The publication of oral slander, though a tort, is not criminal; but the publication of a libel may amount to a misdemeanor. Generally the same kinds of publications are libelous in the criminal law as in the law of torts;[2] but the rules as to criminal libels are in some respects different from those relating to civil ones, chiefly because a libel, besides being injurious to the person libeled, tends to provoke a breach of the peace, for which reason libels are often classed with offences against the public peace rather than against individuals.

Libels on deceased persons.

A libel upon a deceased person may be criminal, the injury being to his family.

Malice.

To amount to a crime the publication must be malicious, that is, made with an intent to provoke the injured party to wrath or bring him into public hatred, contempt or ridicule. But malice is *prima facie* presumed from the libelous character of the publication.

Publication.

Publication does not necessarily mean, as in the case of civil libels, the communication of the libelous matter to third persons; it may be effected by showing or sending it to the person libeled himself.

Falsity.

At common law a criminal libel need not be false. The publication of a derogatory statement which is true is as likely

[2] See § 429 *et seq.*

to cause a breach of the peace as if it were false; indeed perhaps more likely. There was an old saying: "The greater the truth the greater the libel." But the publication of a truthful statement, however injurious, is not criminal, if the publisher can show that it was for the public benefit that it should be published; and the constitutions of the United States and of most of the American states provide that the truth of the publication shall be a complete defence in prosecutions for libel.

Privileged communications.

The rules as to privileged communications apply to criminal libels.[3]

III. Crimes against property.

1222. Theft or larceny (*latrocinium*) is the wrongful taking and carrying away the goods of another with intent to deprive the owner of his property in them.

Theft or larceny.

There must be a taking possession of the goods by the thief, amounting to a trespass. A wrongful injury to goods, or even their wrongful destruction, without taking possession is not theft; but a momentary possession is enough. Therefore, too, a person can not steal goods of which he already has possession. If a bailee of goods wrongfully sells them or in any manner converts them to his own use, this is not theft; but if a bailee opens a box or package of goods entrusted to his possession, which he has no right to open, and takes out a part of the contents and converts them, he is guilty of theft, because, though he has possession of the box or package with its contents as a whole and therefore can not steal it, he is not deemed to have any possession of the contents as separate things. A servant, however, to whose custody his master's goods are committed, has not possession of them but only detention, so that he can commit larceny of them.

Taking.

Possessor can not steal.

Theft by servants.

Carrying away or asportation means any, even the slightest, removal of the thing from its place. It has been decided that where a person put his hand into another's pocket, seized a pocket book and lifted it an inch or two from the bottom of the pocket, but was detected and dropped it before he had got it out of the pocket, there was a sufficient asportation.

Asportation.

[3] See § 780 *et seq.*

What things can be stolen.

Theft can be committed only of goods and chattels, not of real property or choses in action. If things which are attached

Real property.

to land, such as a part of a house, trees, grass or growing crops, are severed and carried away by one continuous act, there is no larceny; the things so severed become chattels by the taking, and there is therefore no taking of them as chattels. Such was the reasoning of the old lawyers. But if such things are severed and thus turned into chattels, and then taken away on a subsequent occasion, the taking may amount to theft. It

Choses in action.

was formerly held that bonds, bills, notes and other evidences of debt, having no intrinsic value, were not chattels but mere choses in action and could not be stolen. Animals *ferae naturae*

Animals.

in which no one has any property right, are not the subject of larceny; but it is otherwise if such animals are reclaimed and confined and may serve for food, such as deer in a park or fish kept in an artificial fish pond. However, animals like dogs, cats or singing birds, which are not useful for food or work but are kept merely as pets, are put upon the footing of wild animals.

Fraudulent intent.

1223. The taking must be wrongful, and this implies that it is without the consent of the owner. It must also be *animo furandi*, that is with a culpable, or as it is called in this connection a felonious or fraudulent, intent to deprive the owner of his property. Therefore a temporary borrowing of a

Intent to restore.

thing with the intent to use it for a while and then restore it again, even without the consent and against the will of the owner, though wrongful and amounting to a trespass, is not theft.

Theft by the owner.

Nor is it theft for the owner of a thing wrongfully to take it back from another who has the right of possession, for example from a person who has hired it for a fixed time. But for

Pledgor.

a pledgor of goods to take them back from a pledgee constitutes an exception to this rule, and is larceny. A mortgagee

Mortgagor.

of goods is the owner of them, and the mortgagor or a third person may steal them from him. It is not necessary, however, to the crime of theft that the owner of the goods be known. A

Taking by mistake.

person is not guilty of larceny who takes goods under a *bona fide* claim of right, believing that they are his or that he has a right to their possession, even though he be mistaken and the taking in fact wrongful; he has no culpable intent.

Such was the crime of theft at common law. But by statute in modern times its scope has been extended. It may now be committed of things attached to land, of any tame animals and of written documents of all sorts; and in many places by taking even with an intent subsequently to restore. Modern law of theft.

1224. At common law if the goods stolen were above the value of twelve pence, which was a relatively larger sum in ancient times when the value of money was high than at present, the crime was grand larceny, and was a felony; if not over that sum, it was called petit or petty larceny, and amounted only to a misdemeanor. The distinction between grand and petty larceny still exists, but the limit of value of the latter has been raised, being now generally about twenty five dollars. Grand and petty larceny.

Theft with circumstances of aggravation, such as theft from a dwelling house or from the person, for example pocket-picking, is generally punished more severely than simple larceny. Aggravated thefts.

1225. Embezzlement is the wrongful misappropriation *animo furandi* of money or other personal property which the embezzler has at the time in his possession, and which therefore he can not in the technical sense steal. Except in what depends upon possession, it is governed by substantially the same principles as theft. It was not a crime at common law; but by statute at present it is either made a separate crime, being a felony or a misdemeanor according to the value of the property embezzled, or is included under the extended definition of larceny. Embezzlement.

1226. Robbery (*rapina*) is theft by "taking from the person of another or in his presence, against his will, of any money or goods to any value, by violence or by putting him to fear by threats of any kind of injury."[4] The gist of the crime is the use of force or fear, secret stealing from the person, such as picking pockets, does not amount to robbery; for which reason robbery is often classed with crimes against the person. It is a felony. Robbery.

1227. Burglary is breaking and entering a dwelling house at night with intent to commit a felony therein. The intent is usually to steal, but it may be to murder, ravish or perpetrate Burglary. Intent.

[4] Harris, Criminal Law, 232.

Breaking. some other felony. Breaking means the use of any degree of force to get in; even opening a door or window which is closed though not locked, but walking or climbing in at an open door or window is not a breaking. A dwelling house is any permanent structure where a person lives. It may be a whole house or a single room or suite of rooms in a building the remainder of which is used for other purposes, as a janitor's room in an office building; but not a tent or other temporary structure, though actually inhabited. Burglary is a felony at common law.

Dwelling house.

Statutory burglary. By statute various other unlawful breakings and enterings, such as breaking and entering a building other than a dwelling house, or a dwelling house in the day time, or an unlawful entry without breaking, with intent to commit a crime, are made felonies or misdemeanors. These offences are usually known as statutory burglary.

Receiving stolen goods. **1228.** Receiving stolen goods knowing them to be stolen with the intention of wrongfully detaining or assisting in detaining them from the owner, was a misdemeanor at common law, and is now in some cases a felony.[5]

Cheating. **1229.** Cheating at common law meant the fraudulent obtaining the property of another by any deceitful or illegal practice or token, which affected or might affect the public. The possible publicity of its consequences was the chief characteristic of the offence; mere private frauds in dealings between individuals were not criminal. Cheating included various dishonest practices by persons in the course of trade, such as knowingly selling unwholesome provisions or using false weights and measures. But by various old statutes the getting another's property by the fraudulent use of any false token, such as by playing with false dice or the use of a forged letter, was made criminal, though mere verbal misrepresentation or fraud in general was not. At present however most actual frauds by which a person is induced to part with his property are crimes, for instance, fraudulently obtaining property by false pretences of any sort or by falsely

False tokens.

False pretences.

[5] A person who makes a business of buying stolen goods from thieves is commonly known as a "fence."

personating another. These acts are usually called swindling; but that name is not in law the name of any specific crime, and is often applied to acts which are not criminal. Criminal frauds are sometimes felonies, but usually misdemeanors. The distinction between larceny and obtaining property by fraud is that in the former the owner does not consent to part with his property at all, while in the latter he does consent but under a misapprehension caused by the fraud. The difficulty of determining in practice which crime has been committed, and the consequent failures of justice through the criminal's being prosecuted for the wrong crime, has led the legislature in some places to class all criminal frauds whereby property is got from the owner with larceny.

Swindling.

Theft and fraud.

1230. Arson (*ab ardendo*) at common law was the wrongfully and wilfully burning the dwelling house of another man. It is not necessary that the house be burned up; it is enough if it takes fire and burns to any extent. The burning must be wilful; if a person sets fire to another's house by accident, or even by negligence, he is not guilty of this crime. A person could not commit arson, which was a felony, by burning his own house, unless the fire communicated to another's house; but the wilful firing of one's own house in a town was a misdemeanor because of the danger to others.

Arson.

Burning one's own house.

In modern times various other wilful and unlawful burnings have been made felonies or misdemeanors by statute, for instance burning a building other than a dwelling house, or setting fire to crops, hay or timber.

Modern law of arson.

1231. Malicious mischief is generally a misdemeanor, but in some cases a felony. It includes a great number of offences, some defined by the common law and others by various statutes, most of them against property but some against the person, which can not be enumerated here. Malice in these crimes generally means actual malice, but not in every case. It always however includes a culpable intent or at least recklessness. The invention in recent times of high explosives, such as dynamite, has put a terrible weapon into the hands of fanatics who desire to avenge their real or fancied wrongs upon society generally or particular persons or classes of persons, and it has been found

Malicious mischief.

Malice.

Injuries by explosives.

necessary to make very strict laws providing for severe punishments for such crimes or attempts at their commission.

Forgery.

1232. Forgery, or the *crimen falsi*, was defined at common law as "the fraudulent making or alteration of a writing to the prejudice of another man's right."[6] It is not necessary that the whole instrument be forged; the fraudulent obliteration, insertion or alteration of a single word may be enough. But there must be a fraudulent intent. If A, supposing himself to be duly authorized by B when in fact he is not, makes a promissory note or other contract in B's name and signs B's name to it, his act is not criminal, though the instrument is void and though third persons incur damage by relying on it as genuine. However A in such a case may come under a civil liability. It is not necessary that the document, if genuine, should have been valid, provided it is apparently valid.

Fraudulent intent.

Void instruments.

Use of the forged instrument.

The mere making a forged instrument with a fraudulent intent is a crime, even though no one is injured thereby and the forger makes no attempt to use it. Fraudulently using or uttering a forged document prepared by another person is also criminal.

Modern law of forgery.

In modern times the whole subject has been regulated by statutes which define all the elements of the crime, and extend it to the fraudulent imitation and use of various marks and devices other than writings, such as the hallmark on jewelry and plate, but not generally of trademarks, the fraudulent imitation of which is usually a distinct crime. Forgery is sometimes a felony and sometimes a misdemeanor.

Game laws.

1233. The game laws are statutes which forbid the killing or capture of game by unauthorized persons or at certain times or places. These in England are principally intended to protect the rights of the owner of the land on which the game is found, who are regarded as having a sort of qualified property in the game,[7] so that violations of them are properly classed as crimes against property. Killing or taking game wrongfully upon another's land is called in that country poaching. But in the United States the owner of land has no more right

Poaching.

[6] 4 Black. Com., 247.

[7] See § 539.

in the game upon it than in other wild animals there, and the object of the game laws is merely to prevent the extermination of game by the destruction of the young or of the parent animals during the breeding season. But statutes have also been enacted to protect the rights of persons who have taken pains to stock their land with game or streams or ponds with valuable fish.

CHAPTER LXXVII.

THE PUNISHMENT AND PREVENTION OF CRIMES.

Treason and felony.

1234. At common law treason and all felonies were punished by death. But in ancient times a clerk or clergyman convicted

Benefit of clergy.

of a felony was not hanged but handed over to the ecclesiastical courts to be dealt with by them, where he usually escaped with a light punishment or none at all. This was called benefit of clergy. Then, such was the prevailing ignorance of the period, the presumption was established that any man who could read was to be deemed a clerk. But women did not have benefit of clergy. About the time of Henry VII a distinction was made between real clerks and laymen who could read. The latter were only allowed to claim their clergy once, and were then burned on the left hand to mark them; on a second conviction they were punished as laymen. Benefit of clergy has now been abolished.

Hanging.

The penalty of death for felony was inflicted by hanging; but for treason in a different and very barbarous manner. The

Hanging, drawing and quartering.

traitor was sentenced to be hanged, drawn and quartered; that is, he was to be drawn to the gallows and not be carried or walk, to be hanged by the neck and then cut down alive, his entrails to be taken out and burned while he was yet alive, his head to be cut off and his body to be divided into four quarters, which were to be at the king's disposal. But the king had the power, which he often exercised, to remit all

Beheading.

the punishment except the beheading. If the criminal was a woman, because decency forbade the public exposure and man-

Burning of women.

gling of her body, she was drawn to the gallows and there burned alive. These barbarities are now abolished, and the

Modern forms of death penalty.

punishment of death is everywhere by hanging, except in a few of the United States, where a more quick and painless mode of execution by sending a powerful electric current through the body has lately been introduced.

In most places treason, murder in the first degree, and piracy, and in some places rape and certain cases of arson, are still punishable with death, though in a few of the United States the death penalty has been abolished and imprisonment for life substituted for it. What crimes are now punished by death.

1235. Felonies generally are now punished by imprisonment, to which a fine is sometimes added; very rarely by a fine only. At common law the punishment for most misdemeanors was fine or imprisonment or both at the discretion of the court. At present the maximum period for which a person can be imprisoned or the maximum fine that can be imposed for any crime is fixed by law and not left to the discretion of the judge; sometimes also a minimum is fixed. But considerable latitude is always reserved to the court in determining the penalty, so that any circumstances of aggravation or mitigation that may exist may be taken into account in each case. Imprisonment and fine.

Imprisonment for felonies is in a prison or penitentiary, for misdemeanors usually, but not always, in a jail. A prison is a place purely of punishment. In the United States it usually belongs to the state and is therefore known as the state prison. Death or imprisonment in a prison is regarded as an infamous punishment, and usually entails upon the offender a forfeiture of his political rights, such as the right to vote or hold office, for the remainder of his life. When a statute declares that to be eligible to an office or other appointment or for any other purpose a person must be of good moral character, it generally means that he must not have been convicted of a crime for which he might have been sentenced to an infamous punishment. A penitentiary in some places means the same as a prison, and in others is a kind of prison where persons convicted of less serious offences are confined and imprisonment in which does not involve infamy. A jail is primarily a place of detention, not of punishment. It usually belongs to a county, and is therefore called the county jail. Prisoners confined therein are in the custody of the sheriff, whose officer the jailor is. Persons arrested on civil process, who are not guilty of any crime, and persons charged with crimes who are awaiting trial and whom in the mean time the law presumes to be innocent, are kept in the jail, the purpose of

Prisons.

Infamy.

Penitentiaries.

Jails.

their detention not being to punish them to but insure their presence in court when wanted or to coerce them to comply with a judgment or decree of a court. But for convenience the jail is also used for the imprisonment of petty criminals by way of punishment. If a person is sentenced to pay a fine for a crime and does not pay, he is kept in jail for a time proportioned to the amount of the fine, in the United States usually one day for each dollar of the fine. Imprisonment in a jail is not an infamous punishment.

Imprisonment for non-payment of fines.

Mutilation and branding.

1236. In former times mutilation, especially cutting off the ears but often more serious maiming or disfigurement, and branding with a hot iron, were practiced as punishments for various crimes, but have long since been given up as inhuman.

Pillory and stocks.

The pillory and the stocks, which were instruments designed to hold the criminal by his hands and neck or hands and feet in a fixed and uncomfortable position, in which condition he was exposed for some hours in a public place to the abuse and insults of the populace, have also gone out of use.

Whipping.

Whipping, which was once a very common mode of punishment, has been entirely abolished in most places, and in those where it is still retained it is inflicted only for a few especially brutal crimes. So that the only punishments for crimes that are now generally used are death, imprisonment and fines. The constitution of the United States and those of most of the states forbid the infliction of cruel and unusual punishments.

Cruel and unusual punishments.

Statutes of limitations.

1237. Prosecutions for crimes, except generally for murder, are barred after a certain time, usually three years, by statutes of limitations.

Pardon.

1238. The President of the United States, the Governors of the states and the Crown in England may pardon persons guilty of crime. In some of the United States however this power is committed to a board of pardons instead of to the Governor; the Governor being however generally a member of the board. A pardon may be granted before the offender has been prosecuted for the crime or at any time afterwards. It not only relieves him from so much of the penalty as has not been actually suffered by him, but restores him to a state of legal innocence, doing away with all infamy, forfeitures and disabilities. The power to

pardon includes a power to commute or reduce the punishment, and also to grant reprieves. A reprieve is a temporary suspension of punishment. Commutation of sentence.

1239. A person whom there is probable ground to suspect of future misbehaviour, or in some cases who has been convicted of crimes against the peace, may be required to give security to keep the peace or for good behavior. This security consists of a bond in the form of a recognizance or undertaking, entered into with sureties, before a court or magistrate, in a certain penal sum fixed by the court or magistrate, conditioned that the suspected party shall keep the peace either toward the public generally or toward the person who has asked for the security, or that he shall be of good behavior, for a time mentioned in the order, most often one year. If he refuses or is unable to furnish the bond, he may be committed to jail for a period usually not exceeding twelve months. If the condition is broken by a breach of the peace in the one case or by any criminal misbehavior in the other, the bond is forfeited and a suit may be brought in the name of the state or the Crown against the party and his sureties for the amount of the penalty. The bond is estreated, or extracted from the other records, and sent to the proper court for this purpose. Security for the peace or for good behavior.

These bonds may be taken by the judge of criminal courts and certain peace officers, such as justices of the peace, police justices, sheriffs or coronors, either of their own motion or on the application of a private person upon due cause shown. If a peace officer refuses to act upon such an application, the applicant may have a writ, called a *supplicavit*, from a superior criminal court ordering the officer to do so; but this writ is seldom issued, the higher court in such cases usually taking the recognizance itself. Who may take security. *Supplicavit.*

1240. A magistrate may take security for the peace from all persons who commit or threaten to commit breaches of the peace in his presence, as by making affrays, who go about armed to the terror of the people, or who are arrested by a peace officer in whose presence they have committed a breach of the peace, and in some other cases. Security for the peace.

If a private person makes to a competent magistrate a com- Complaint by a private person.

plaint that another person has threatened by word or conduct to kill him or his wife or child or do him or them bodily harm or burn his house, swears that he is fear of such injury and that he is not acting out of malice or for mere vexation, and shows reasonable grounds for his apprehension, which is called "swearing the peace" against another, the magistrate must put the latter under security to keep the peace as to the complainant.

Security for good behavior.

Security for good behavior includes security for the peace and also against the commission of other crimes, either any crime generally or some particular crime named in the order. A magistrate may bind over to good behavior all persons "that be not of good fame," which includes rioters, barrators, cheats, vagabonds, eavesdroppers, common drunkards, frequenters of bawdy-houses, and generally persons of habitual evil life or persons whom there is good reason to suspect will probably commit crimes. This kind of security is rarely exacted in modern times.

CHAPTER LXXVIII.

CRIMINAL PROCEDURE.

Appeals of treason and felony.

1241. In ancient times treason and certain felonies might be prosecuted for in a proceeding called an appeal, which was in the nature of a private suit brought by the party injured or by some near relative of a person feloniously killed, or in case of treason by any person, against the wrongdoer. If convicted, the latter was punished in the same manner as on a public prosecution. This seems to have been a survival from those rude times when all or nearly all crimes were punished or atoned for by a fine known as weregild payable to the injured party or his family; and an appeal was probably at first merely a suit for the weregild. Therefore the King could not pardon a person convicted on an appeal; but the appellor himself could at any time discharge the appeal, and even after conviction the punishment might be remitted by his consent. By the statute of Westminster 2nd. an unsuccessful appeal subjected the appellor to fine and imprisonment and the payment of damages to the appellee, which caused appeals to go out of use.

Disuse of appeals.

Punishment on view.

1242. In some places a magistrate has authority to punish certain petty offences committed in his presence by imposing at once a small fine upon the offender without any trial, in technical language, on view.

Criminal prosecutions.

1243. A crime is regularly punished on a public prosecution, that is, a criminal action brought in the name of the state or in England of the Crown. But at common law the prosecution, though in the name of the King, was really in most cases of crimes against individuals instituted and carried on by a private person, who was called the prosecutor and was generally, though not necessarily, the person injured by the crime or in case of homicide some member of his family. If no one cared to prosecute, the criminal went unpunished, unless for some reason, for instance because the crime particularly affected the

The prosecutor.

government, the attorney general saw fit to take the matter up and prosecute on behalf of the Crown. It was in order to prevent people from shirking the public duty of prosecuting criminals that compounding a crime was itself made a crime, and the rule was introduced, which has been already mentioned, that when the same act was a felony and a tort the injured party could not sue for the tort until he had prosecuted for the felony. At present public prosecuting officers are everywhere appointed whose official duty it is to prosecute criminals, though in some places private persons may also do so in certain cases; so that the prosecution of a criminal by a private person now usually means simply a complaint made by him to the prosecuting officer on which the officer acts.

Prosecuting officers.

Commencement of a Prosecution.

1244. A criminal prosecution may be begun in three ways: (1) by the arrest of the offender without a warrant; (2) by a complaint to a magistrate; (3) by an information, presentment or indictment presented to a superior criminal court.

Arrest without warrant.

The cases in which a person may be arrested without a warrant have been already mentioned.[1] The person arrested must be taken at once before a magistrate and a complaint made against him. If no one appears to complain, he is discharged. If a complaint is made, the subsequent proceedings are the same as if he had been arrested on a warrant.

Hue and cry.

There was also an ancient method of arrest without a warrant by hue[2] and cry, that is, by immediate pursuit. This was regulated, though not originated, by a statute of Edward I, which enacted that immediately upon robberies and felonies being committed fresh suit, *i.e.* pursuit, shall be made from town to town and from county to county, and they that keep the town shall fellow the felon with hue and cry, with all the town and the towns near, until the felon be taken and delivered to the sheriff. Hue and cry might be raised by the precept of a justice of the peace, by a peace officer or by any private person that knew of a felony. The party raising it must acquaint the constable of the vill with all the circumstances which he knew of the felony, and thereupon the constable was to

[1] See § 738.

[2] From *huer*.

search his own township and raise all the neighboring vills and make pursuit with horse and foot.

Complaint. **1245.** A complaint is a written accusation of crime against a person made to a magistrate by a prosecuting officer or by a private person under oath. A magistrate here means a justice of the peace or some officer having similar powers, such as a police justice, or in the United States in case of crimes against the national government a United States commissioner. Judges of criminal courts and the chief executive officers of cities and boroughs are also usually magistrates.

Magistrates.

Warrant of arrest. **1246.** On receiving the complaint the magistrate issues a warrant for the arrest of the offender; except that in case of trifling offences a summons is sometimes issued first to save the accused party from the indignity of an arrest, and then if he disobeys the summons, a warrant follows. A warrant may be directed to all peace officers generally or to some particular officer, or in case of necessity to a private person. It can generally be executed only in the county where it is issued, unless it is backed or endorsed by a magistrate in some other county. It should be given under the hand of the magistrate, and under his official seal if he has one. It must state the time and place of making it and the cause for which it is granted. In case of theft and similar crimes it may contain a direction to search for and seize the stolen goods, and is then known as a search warrant. The warrant must specify. either by name or description, the particular person or persons who are to be arrested, and in case of a search warrant the goods to be seized and the place or places to be searched. A general warrant, not containing such a specification, for example a warrant commanding the arrest of all persons guilty of a certain crimes or the seizure of all stolen goods or the search in any house for such goods, is illegal and utterly void on its face. General warrants having been formerly used by the government as instruments of oppression and tyranny and for the annoyance of political opponents, they. are expressly prohibited in England by statute, and in the United States by the national and state constitutions. A

Summons.

Form and requisites of a warrant.

Search warrants.

Description of persons and things.

General warrants.

When a warrant may be executed.

warrant may be executed at any time in the day or night, and in case of treason, felony or breach of the peace on Sunday.

Extradition.

1247. If a person accused of crime flees into a foreign country, or in the United States into another state, he may in certain cases be extradited, that is, arrested on a warrant issued by or by the direction of the chief executive officer of the state where he has taken refuge on a proper application from the government of the state where the crime was committed, and handed over to the authorities of the latter state. Extradition to or from foreign countries is not a matter of right under the rules of international law, but is entirely regulated by treaties, which specify the crimes for which it may be had and the procedure to be followed Generally it is not allowed for what are called political crimes, such as rebellion against the government, which in many cases are not morally blameworthy; and sometimes assurances are required from the government asking for extradition that the person surrendered shall not be tried for any crime except that for which he is extradited. Occasionally a state will arrest and deliver to another a criminal without any extradition treaty, as an act of comity. Extradition between the states of the United States of all criminals is made obligatory by the national constitution; but no way has been provided of enforcing this enactment, and in some instances the governors of states have exercised a discretion to refuse to grant warrants for criminals when demanded by other states. No nation or state will surrender a criminal whom it is holding under arrest or in prison for a crime committed against its own laws, till its own justice has first been satisfied.

Interstate extradition in the United States.

Persons held for crime not surrendered.

The person arrested must be brought before a magistrate.

1248. When a person is arrested on a warrant he must be brought forthwith before a magistrate, either the same magistrate who issued the warrant or another. If the crime of which the party is accused is one over which the magistrate has jurisdiction, he proceeds to the trial at once without a jury or, as the legal phrase is, summarily, though he may postpone the trial for a reasonable time to enable the prosecutor or the defendant to prepare his case or his defence. The summary jurisdiction of magistrates is confined to petty offences punishable by a small fine or a short confinement in jail, usually in the United States

Summary trial.

a fine of not more than one hundred dollars or imprisonment for not over thirty days.

If the crime is one triable by a higher court, the magistrate enters upon a preliminary examination to find out whether there is probable cause for supposing the party guilty. For it is a general rule that a person shall not be detained for trial or subjected to the expense, trouble and ignominy of a criminal trial, until it has first been determined by some sort of a preliminary inquiry that there is reasonable ground of suspicion against him. In this examination the magistrate may interrogate the defendant himself. But the defendant is not obliged to answer any questions put to him, it being an inviolable rule of the common law that no man shall be compelled to incriminate himself or furnish evidence against himself of any crime. And before putting any question to the accused person it is the duty of the magistrate to distinctly inform him that he is at liberty to refuse to answer and that his refusal can not be used against him on his trial as evidence of his guilt.

The preliminary examination.

Interrogating the defendant.

If on the examination the magistrate finds that there is no probable cause for thinking the defendant guilty, he sets him free and the proceeding ends there. But this is not equivalent to an acquittal, and does not protect the party from being again prosecuted for the same alleged offence.

Discharge for want of probable cause.

If however the accused person waives his right to a preliminary examination, as he may do since the proceeding is instituted purely for his benefit, or if probable cause is shown for thinking him guilty, the magistrate by a writ called a *mittimus* commits him to jail to await his trial or to await the action of the grand jury who may find an indictment against him,[3] or in a proper case releases him on bail.

Commitment for trial or holding to bail.

1249. Bail in criminal cases is the same as in civil ones,[4] a recognizance or undertaking with sureties that the defendant will appear where called upon and stand trial. Its amount can seldom be fixed by law, but must be left to the discretion of the magistrate. However the national and state constitutions in the United States forbid the requirement of excessive bail.

Bail.

Excessive bail forbidden.

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[3] See § 1251 *et seq.* [4] See § 1040.

Right to bail.

The right to bail is a common law right, but has been regulated and defined by statute. The rules as to when it must or may be allowed are not quite the same in all places. Sometimes admission to bail is a matter of right for the accused person, sometimes it lies in the discretion of the magistrate or of some superior court, and sometimes it is not allowed at all. The modern law is more favorable to persons accused of crime in this respect, as in many others, than the old law. Generally bail is not allowed at all, or is allowed only in the discretion of some higher court or officer, in cases where the crime charged is punishable with death. In serious felonies it is sometimes discretionary, but is usually a matter of right, as it nearly always is in smaller offences.

Remedy if bail is refused.

If a magistrate refuses bail when he ought to grant it or fixes its amount too high, the prisoner may have himself brought before a superior court by a writ of *habeas corpus*, and there be admitted to bail in a proper sum.

Right to a speedy trial.

1250. An accused person has a right to a speedy trial, which right is guarantied by special provisions in all the American constitutions. If the trial is unreasonably delayed without the consent of the accused person, he may obtain his release from imprisonment on a writ of *habeas corpus* or his bail will be discharged from liability.

Indictment or presentment.

1251. Treason, felony and serious misdemeanors, all crimes in fact which do not fall under the summary jurisdiction of magistrates, must be prosecuted at common law by indictment or presentment. Hence arises a division of crimes into indictable crimes and those which are not indictable. At common law, however, if a thief was caught "with the *mainour*," that is, with the stolen property in his possession (*in manu*), he might be taken at once into court and tried without any indictment.

Indictable crimes.

Thief taken with the *mainour*.

Nature of an indictment.

An indictment is a written accusation presented upon oath to a superior criminal court by a grand jury.

The grand jury.

1252. An ordinary jury empaneled for the trial of a particular civil or criminal action is called a petit, petty or trial jury. For a grand jury a panel of jurors separate from the trial jury panel is summoned to attend each term of a superior criminal court, and from this panel a number of jurors not less than twelve or more than twenty three, so that twelve may constitute

a majority, is drawn for the grand jury. It is the duty of the grand jury to investigate and present or report to the court all indictable crimes committed in their county, and any other matters of public importance, such as maladministration by public officers, which they may think fit to take notice of. The grand jury are sworn to inquire only for the body of the county, *pro corpore comitatus*; and therefore they can not regularly inquire of a fact out of their county. And to so high a nicety was this anciently carried, that if a man was wounded in one county and died in another the slayer could not be indicted for the homicide in either county, there having been no complete felony committed in either. But the common law in this last case has been changed by statute. This inability of a grand jury, together with a similar inability of a petit jury, to inquire of things done out of the county was one of the principal sources of the jurisdiction of the courts of admiralty over crimes and wrongs committed on the high seas.

Functions of the grand jury.

After having been duly sworn faithfully to discharge their duties and receiving a charge from the judge instructing them as to their duties, the grand jury retire to a private place and deliberate under the same obligation of secrecy as a trial jury. No one else may be present in the grand jury room except those public prosecuting officers whose duties in connection with indictments require their presence there and persons summoned or admitted as witnesses or complainants; and even these must retire while the grand jury is actually deliberating. Unanimity is not required from a grand jury, but at least twelve jurors must consent to every indictment and presentment.

Procedure before the grand jury.

Bills of indictment are drawn up and presented to the grand jury for their consideration by the proper law officer of the state, who summons such witnesses and produces such evidence before them in support of the charge as he thinks proper. The grand jury may also call for other witnesses or evidence if they choose. The accused person has no right to be present or to offer any evidence, and indeed is not notified of the proceeding at all; the object of the investigation being not to find out whether he is guilty, but whether there is sufficient probability of his being guilty to make it proper to subject him to a trial. If the

Bills of indictment.

Investigation by the grand jury.

The decision of the grand jury.

grand jury consider that the accusation is not sufficiently established, they indorse on the bill of indictment "not a true bill" or "not found", or formerly the word *ignoramus*. This terminates the proceeding; and if the accused is already in custody or under bail, he or his bail are discharged. If on the contrary they are satisfied of the truth of the charge, they endorse the bill with the words "a true bill" or anciently *billa vera*. The indictment is then presented or delivered to the court, and the party stands indicted of the crime.

Presentment by the grand jury.

1253. A presentment by a grand jury in the widest sense includes an indictment. But in the strict sense it means a written statement presented to the court by the grand jury of their own accord without any bill having been laid before them by a law officer of the state. Presentments generally relate to matters other than crimes; and if a presentment charges a person with a crime, he can not be tried on the presentment, but a regular indictment must be framed against him.

Inquests as presentments.

The results of certain inquests of office and other inquisitions by petit juries, for instance the verdict of a coronor's jury summoned to investigate the cause of a person's death, if it find any one guilty of homicide, or the verdict of a jury in a civil action that a crime has been committed, have the force of presentments, upon which the accused person may be put upon trial without indictment, though in modern times it is usual to have him indicted.

Informations.

1254. The nature of an information has already been explained.[5] It is sometimes used in criminal cases where the government is the actual prosecutor; and in some of the United States it is now for convenience' sake the ordinary method of prosecution, grand juries being rarely summoned.

Process on an indictment.

1255. An indictment may be found against a person before he has been arrested or any complaint made against him, in which case process must be issued to bring him into court. At common law the regular process when the indictment was for a misdemeanor was a writ of *venire facias*, commanding the sheriff to summon the defendant to appear, to which, if the defendant

Venire facias.

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[5] See § 940.

did not appear, a *distringas* succeeded, provided it was shown by the return to the *venire* that he had land in the county whereby he might be distrained. If he had no such land and failed to put in an appearance, a *capias* issued to take his body. But in cases of treason and felony a *capias* was the first process. If the defendant could not be taken on a *capias*, he might be outlawed, substantially as in a civil action. At present however a warrant of arrest is the usual process. This may be issued by a magistrate or by the court to which the indictment is presented. In the latter case it is called a bench warrant, and may run into any county. When the accused person is arrested on the warrant no preliminary examination before a magistrate is held, the proceedings before the grand jury being equivalent to a preliminary examination, and the defendant is only taken before a magistrate to be bailed. If the indictment is found after the defendant has already been arrested and held for trial or admitted to bail, no process is necessary. If a corporation is indicted, since it can not be arrested, a *distringas* or attachment against its land and goods is the proper process, but sometimes a summons is first issued. It must appear by its attorney, personal appearance being impossible.

Distringas.

Capias.

Outlawry.

Warrant of arrest.

Bench warrant.

No preliminary examination.

Bail.

Indictment after arrest.

Process against a corporation.

1256. A natural person can not be tried for a crime unless he is personally present in court. On coming into court for trial the defendant must be arraigned, that is, brought to the bar and called upon to answer the accusation. The document containing the accusation must be distinctly read to him, and translated to him if he does not understand the language in which it is written. In ancient times when pleadings were in Latin it had to be read in English. He is then put to plea, that is, required to plead to the complaint, indictment or information.

Presence of the accused in court.

Arraignment.

Reading of the charge.

Putting to plea.

At common law a court could not proceed to try a prisoner until he had pleaded. If he stood mute, that is refused to answer, it was the duty of the court to empanel a jury and inquire whether he did so through obstinacy or was dumb *ex visitatione Dei*. If the latter was found to be the case, the trial went on as if he had pleaded not guilty, the judges being bound to see that he had law and justice done him. If it appeared

Standing mute.

that he was capable of answering but he still refused to plead this in treason or misdemeanor was taken as a confession of guilt and sentence was pronounced against him. But in felony he was subjected to the torture known as *peine fort et dure* to make him answer, which consisted in laying him naked upon his back on the floor of the prison, piling upon his body "as great a weight of iron as he could bear and more", and keeping him almost without food or drink, until he died or consented to answer. This was commonly called pressing to death, and was endured even to death by some felons so as to avoid a conviction and thus preserve their property from forfeiture for the benefit of their families. At present however the law does not permit such atrocities; and if a defendant in any case or for any reason refuses to plead, a plea of not guilty is entered for him and the trial proceeds.

Peine fort et dure.

If the defendant wishes to confess the crime, he pleads guilty, and is at once sentenced. The court however will not receive a plea of guilty, if there is any reason to doubt that the defendant makes it freely, without compulsion or undue influence of any kind, and with full understanding of the nature and consequences of what he is doing; but in case of doubt will set it aside and order a plea of not guilty to be entered.

Pleading guilty.

1257. There was anciently another kind of confession called approvement, which was where a person indicted for treason or felony confessed his guilt, and, in order to obtain his own pardon, appealed or accused others his accomplices in the same crime. Such a person was called an approver or prover (*probator*), and the party accused the appellee. The appellee could be arraigned and tried for the crime of which he was so accused without any indictment, and if he was convicted the approver was entitled to his pardon *ex debito justiciae*; if however he was acquitted, the approver was hanged on the strength of his own confession. Approvement is now obsolete, but it is not uncommon for a person charged with crime to make terms for himself and obtain his own pardon or release or a lighter sentence by furnishing evidence against other guilty parties. This is called turning state's evidence, or in England king's evidence; but the old name of approver is sometimes applied to a person who does so.

Approvement.

States evidence.

1238. The defendant when assaigned may demur or plead to the jurisdiction or in bar, and a plea in bar may be a traverse, either the general issue or a special traverse, or in confession and avoidance, as in a civil action. But it is very rare that a defendant demurs or puts in any plea other than the general issue, because the law, contrary to the rule which prevails in civil cases, permits him to make under that plea any sort of defence upon either the law or the facts which he might make under a demurrer or any special plea. If a defendant demurs to the indictment and his demurrer is overruled, he may afterwards plead not guilty, though formerly there was some doubt whether any other plea could be accepted from him. A few defences which sometimes are or were set up otherwise than under the general issue call for brief notice.

Pleadings

General issue.

Pleading over after demurrer.

Formerly there was a plea of sanctuary. If the criminal, except in cases of treason or sacrilege, before his arrest took refuge in any church or churchyard, and within forty days confessed his crime to a coronor and took an oath to abjure the realm, that is to leave the country and never return without the King's permission, and went at once to a port assigned him and embarked, he saved himself from the penalty of death, but not from forfeiture of his property and corruption of his blood. If during the forty days or while on his way to the port he was arrested and arraigned for the felony which he had confessed, he could put in a plea of sanctuary and be set free. Sanctuary was abolished by a statute of James I.

Sanctuary.

Abjuring the realm.

A plea of *autrefois acquit* or *autrefois convict* may be used where the defendant has been previously tried and acquitted or convicted for the same crime or some crime necessarily included in it or in which it is included. This is a good defence as already mentioned.[6] A former conviction is a defence, although for some reason the court did not give judgment upon the conviction.

Autrefois acquit or convict

Autrefois attaint was a plea that the defendant had been formerly attainted, *i.e.* found guilty, of any felony, even an entirely different one from the one that he is charged with on

Autrefois attaint.

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[6] See § 1145.

the trial, and was formerly admitted as a defence on the ground that, the felon being already liable to death, his property forfeited and his blood corrupted, no further punishment could be inflicted upon him, so that a prosecution for any other crime would be superfluous. But *cessante ratione, cessat et ipsa lex*, and various exceptions were formerly admitted to this plea in cases when it might be possible to inflict a further punishment, as in treason, where the traitor might be tortured as well as put to death, or where the former attainder was reversed for error. This entire defence is now abolished.

Pardon. A pardon granted to the defendant before trial may also be pleaded in bar.

Form of general issue. The form of the general issue, as in civil actions of trespass, is "not guilty." It is generally pleaded orally; and in former times an oral replication or joinder of issue, corresponding to the *similiter* in civil pleadings, was put in on behalf of the prosecution, that the defendant was guilty and the prosecution was ready to prove it. These oral pleadings were noted down by the clerk in the minutes; the plea of not guilty (*non culpabilis* or *nient culpable*) being abbreviated to *non cul.* or *nient cul.*, and the replication (*culpabalis*; *et hoc paratus verificare*) to *cul. prit.*, which latter abbreviation has given rise to the English word culprit.

Joinder of issue.

Trial. **1259.** After pleading the custom formerly was to inquire of the defendant how he would be tried, the law allowing in certain cases a choice between several modes of trial. If he chose trial by jury, he replied "by God and the country," or if a peer, "by God and my peers"; to which the clerk responded: "God send thee a good deliverance." But those old formes have now gone out of use.

Trial by jury. In modern times the only mode of trial in criminal cases is by jury, though anciently various forms of ordeal and trial by battle were in use. The jury can not be dispensed with and the trial had before the court or a referee, even by the consent of the parties, as may be done in civil cases. But a trial by the judge without a jury is permitted by statute in some of the United States, if the defendant asks for it. The trial is conducted in substantially the same manner as jury trials in civil actions·

but the following points of difference are or have been of importance.

Challenges of jurors.

In criminal cases the accused has a larger right of peremptory challenge of jurymen than in civil actions. Under the old law the member of such challenges was fixed at thirty five, one less than three full juries, but is now more limited, ten being a very common number.

Counsel for the defendant.

Formerly a person tried for a capital crime was not allowed the assistance of counsel, unless a question of law arose which had to be argued. It was said that the judges should be his counsel.

Witnesses for the defendant

In ancient times also no witnesses were permitted to be called for the defendant; and even until comparatively lately he could not have compulsory process to compel the attendance of his witnesses.

The modern law.

Those unjust discriminations are now abolished, and the defendant in a criminal prosecution has the same rights as in a civil action to counsel and to compulosry process for his witnesses. In the United States these rights are secured by constitutional provisions.

Proof.

1260. In civil cases the jury must decide according to the preponderance of evidence, and the testimony of a single witness is legally sufficient to prove any fact. But a person accused of crime is presumed innocent until he is proved guilty, and this presumption is so strong that in order to convict a person of a crime it must be proved against him beyond a reasonable doubt. If there is any reasonable doubt of his guilt, even though the evidence leaves it much more likely than not that he is guilty, he must be acquitted.

Proof of treason.

Also a person can not be convicted of treason by the testimony of a single witness, but only by the testimony of at least two witnesses to the same overt act or his own confession in open court; a confession made out of court is not sufficient. In the United States this rule is embodied in the constitutions.

Confessions.

Indeed a confession of any crime made out of court, though generally sufficient evidence of guilt, is regarded by the law with suspicion, and will be rejected if it appears to have been made under any sort of compulsion, undue influence or mistake.

Special rules of proof.

In some places there are special statutory rules as to the amount of evidence necessary to prove other crimes.

Proof of rape.

Thus a charge of rape can not in most places be established by the unsupported testimony of the

woman alleged to have been ravished, this being an offence which is peculiarly likely to be falsely charged out of malice, and there being a strong temptation for a woman who has really consented to the fact, if it becomes known, to try to save her character by alleging that it was without her consent.

A person not compelled to criminate himself.

The defendant can not be questioned on the trial or compelled to furnish evidence against himself. This is forbidden in the United States by constitutional provisions. At common law he was not permitted to be examined as a witness or to testify, even with his own consent or on his own behalf, partly on the ground that he was under too great a temptation to testify falsely and partly because he might thus be entrapped into criminating himself. But at present it is considered that the advantage to an innocent person of the opportunity to set forth his own statement of the case outweighs those disadvantages, and it has been enacted by statute that the defendant, though he can not be compelled to do so, may if he chooses testify at the trial. Those statutes also provide that if he does not do so, his refusal shall not be construed as evidence of his guilt or commented upon in any way by the court or the counsel for the prosecution; though of course such provisions can not prevent the jury from drawing their own inferences from the fact of his refusal, so that while an innocent person is usually glad to avail himself of the chance to testify, a guilty person is practically constrained to do so. If the defendant elects to testify on his own behalf, he must submit to cross-examination like any other witness.

Right of the defendant to testify.

The verdict.

1261. The verdict must be a general and unqualified one of conviction or acquittal, guilty or not guilty. In Scotland a jury may bring in a verdict of not proven, which, while it has legally the effect of an acquittal, leaves the party under a stigma of suspicion. But the common law does not permit such a verdict.

Restoration of stolen property.

1262. In case of theft, robbery or embezzlement the court may order the restoration of the property to the person from whom it was taken without further proceedings; but this does not affect the right of any other person who claims the goods to assert his claim in a civil action.

1263. On a conviction for a misdemeanor against a private person the court may, if it thinks proper, permit the defendant to speak with the prosecutor before pronouncing judgment, and if the injured party declares himself satisfied, will inflict only a trifling punishment. Permission to speak with the prosecutor.

At the present day by statute the judge is sometimes authorized in his discretion in case of small offences to suspend the judgment on such terms as he thinks proper, and let the convicted person go on his own recognizance to appear and receive judgment when called upon, which he will not be so long as he observes the conditions imposed upon him. Suspension of judgment.

1264. Before judgment the convicted person is asked what he has to say why judgment should not be pronounced against him, at which time he has an opportunity to present to the court any facts proper to be considered in mitigation of his punishment, and formerly when he could not testify at the trial in his own behalf, he could take this occasion to make any explanations or statements tending to show his innocence, which the court would take into due consideration. Proceedings before judgment.

1265. A motion for a new trial may be made by the defendant for any error committed upon the trial or for any cause which would justify such a motion in a civil action; but the principle that a person shall not twice be put in jeopardy for the same matter forbids such a motion by the prosecution. Motion for a new trial.

The defendant may also make a motion in arrest of judgment for any defect in the indictment or information. Such a motion may also be made at the time of his arraignment. Motion in arrest.

Formerly the statutes of jeofails or amendments did not apply to indictments, and indictments were frequently quashed or judgment arrested for trifling defects of form, whereby many guilty persons escaped punishment. But this has now been altered by statute, and amendments of the pleadings are freely permitted in criminal as in civil actions on such terms as are just. Amendments and jeofails.

1266. Judgment is usually pronounced orally, and in England the judge before giving sentence of death puts on a black cap. By such a sentence the defendant was said at common law to be attainted (*attinctus*) of the crime, the consequence of which formerly was, as has been explained, forfeiture of his land Judgment. Attaint.

Infamy. and corruption of his blood. He also became infamous, and by the old law incapable of testifying as a witness or doing most legal acts.

Forfeiture of goods. But forfeiture of goods followed upon a mere conviction, that is, upon the verdict finding him guilty, even though no judgment was ever pronounced, or upon outlawry.

Writ of error or appeal. **1267.** A judgment against the defendant may be reversed on a writ of error, or in modern practice by an appeal, as in civil actions; but a judgment of acquitted is final and can not be appealed from, because the defendant has once been put in jeopardy by the first trial. At common law, however, writs of error in capital cases were matters of grace, not of right, and could only be had by the defendant by the consent of the King or the attorney general.

Execution. **1268.** After judgment the court issues a warrant to the sheriff for its execution. A warrant for imprisonment is gene-

Mittimus. rally called a *mittimus*. Formerly no warrant was necessary for the infliction of the death penalty. The judge merely signed the calendar or list of the prisoners' names with a memorandum of the judgment in the margin. If the sentence was capital, the memorandum was *suspendatur per collum*, which was abbreviated

Sus. per col. into *sus. per col.* This list was delivered to the sheriff, and served instead of a warrant. But at present a formal warrant is issued.

GLOSSARY.

Ab ardendo, from burning.
Ab initio, from the beginning.
Ab intestato, from an intestate [person.]
Ac etiam, and also.
Actio personalis moritur cum persona, a personal action dies with the person.
Ad filum ripae, to the thread of the bank (stream.)
Ad lavandum et potandum, for washing and drinking.
Ad litem, for the action.
Ad quod damnum, to what damage.
Ad rem, to a thing.
Adscripti glebae, bound to the soil.
A fortiori, by a stronger (reason); still more so.
Agenda, [things] to be done; business.
Aggregatio mentium, meeting of minds.
A mensa et thoro, from board and bed.
Animus domini, the will of an owner.
„ *furandi*, intention of stealing.
„ *possidendi*, intention of possessing.
„ *revertendi*, intention of returning.
Aqua currit, et currere debet, ut solebat, water runs, and ought to run, as it was accustomed.
Assumpsit, he undertook; he promised.
Audita querela, complaint heard.
Autrefois, (*acquit etc.*), already (acquitted, *etc.*)
Beneficium, a benefice.
Billa vera, a true bill.
Breve, writ.
Bona, goods, property.
„ *fides, fide*, good faith, in good faith.
„ *notabilia*, important goods.
„ *waviata*, goods thrown away.
Camera Scaccarii, Exchequer Chamber.
Campi partitio, division of the land.
Cancellaria, Chancery.
Cancellarius, Chancellor.

Capias, ad respondendum, ad satisficiendum, in withernam, take, for answering, for making satisfaction, in reprisal.

Caput lupinum, a wolf's head.

Carta, a charter; a written instrument.

Caveat emptor, let the buyer take care.

Certiorari, to be certified.

Cessante ratione, cessat et ipsa lex, ceasing the reason, the law itself ceases.

Cestui [*a*] *que trust, use, vie,* he [for] whose trust, use, life.

Cognovit actionem, he has acknowledged the [cause of] action.

Comes, stabuli, companion (count), of the stable.

Comitia centuriata, tributa, assembly of the centuries, of the tribes.

Commodatum, a loan for use.

Commune concilium, common council.

Communis error facit jus, common error makes law.

„ *rixatrix,* common scold.

Concessi, I have granted.

Concessio, a grant.

Confirmatio cartarum, confirmation of the charters.

Consensus, non concubitus, facit nuptias, consent, not cohabitation, makes a marriage.

Consortium, companionship.

Contra proferentem, against the putter forth.

Coram nobis, vobis, before us, you.

„ *non judice,* before [a person who is] not a judge.

Coronator, coroner.

Corpus juris canonici, the body of the canon law.

„ „ *civilis,* the body of the civil law.

Crimen falsi, the crime of a cheat.

Cujus est solum, ejus est usque ad coelum, whose is the ground, his it is even to the sky.

Culpabilis, et hoc paratus verificare, guilty, and [I am] ready to prove it.

Cum testamento annexo, with the will annexed.

Curia regis, the court of the king.

Custos rutulorum, the keeper of the rolls.

Damnum, absque injuria, emergens, damage, without wrong (injury), arising.

Darrein, the last.

De actionibus, of actions.

De Arcubus, of Arches.

De bene esse, for [some one's] benefit.
Debet, he owes.
De bonis, asportatis, non administratis, concerning goods, carried off, not administered.
Decemviri, ten men.
De circumstantibus, from the bystanders.
De consuetudinibus et servitiis, of customs and services.
Decretum Gratiani, the decree of Gratianus.
De cursu, of course.
Dedi, I have given.
Dedimus potestatem, we have given authority.
De donis conditionalibus, of conditional gifts.
De facto, in fact; actually.
De heretico comburendo, of burning a heretic.
De homine replegiando, of replevying a person.
De idiota inquirendo, of inquiring about an idiot.
De injuria, of [his own] wrong; injuriously, wrongfully.
De Laudibus Legum Angliae, Of the Praises of the Laws of England.
De Legibus et Consuetudinibus Angliae, Of the Laws and Customs of England.
Del credere, of trust.
De lunatico inquirendo, of inquiring about a lunatic.
De medio, of an intermediate.
De mercatoribus of merchants.
Demisi, concessi et ad firmam traditi, I have demised, granted and to farm (rent) let.
De personis, of persons.
Depositum, deposit.
De prerogativo regis, of the king's prerogative.
De rebus, of things.
De reparatione faciendo, of making repairs.
De secta ad molendinum, ad furnum, of suit to a mill, to an oven.
De son tort, of his own wrong.
Detinet, he detains.
Devastavit, he has wasted.
De ventre inspiciendo, for inspecting the belly.
De visu et auditu, from seeing and hearing.
Dialogus de Scaccario, Dialogue of the Exchequer.
Dicta, sayings.

Dies, a quo, ad quem, certus, incertus, day, from which, to which, certain, uncertain.
Distringas, annoy; distress.
Do, I give.
Doli capax, capable of malice.
Dominium, dominion, ownership.
Dominus, owner, master.
Domitae naturae, of a tame nature.
Domus Procerum, House of Lords.
Donatio, mortis causa, a gift, because of death.
Dos rationabilis, reasonable dower.
Droit, right.
Duces tecum, bring with you.
Dux, leader, commander; duke.
E converso, conversely.
Edictum, edict.
Ejectione firmae, by ejection from [his] hired land (farm.)
Elegit, he has chosen.
Elongata, taken away.
Embler, emblaver, to sow.
Emptio spei, sale of an expectation.
En autre droit, in another right.
Eo nomine, by this name; as such.
Eundo, manendo et redeundo, in going, remaining and returning.
Ex contractu, from contract.
Ex debito justiciae, from an obligation of justice; as his just due.
Ex delicto, from a wrong.
Exitus, an end, finish.
Ex maleficio, from wrongdoing.
Ex nudo pacto non oritur actio, from a bare pact there arises no action.
Ex parte, from [one] part [only.]
Ex post facto, from [something] done afterwards.
Ex relatione, from the report, or statement.
Extendi facias, cause to be extended.
Ex turpi causa non oritur actio, from a polluted cause there arises no action.
Falsa demonstratio non nocet, a false description does no harm.
Feasant, doing.
Felo de se, a felon as to himself.
Feme, covert, a woman, covered.

Feodum militare, a military feud.
Feoffamentum, feoffment.
Ferae naturae, of a wild nature.
Fidei commissum, entrusted to [good] faith; property given to be used in a particular way.
Fidejussor, one who undertakes in good faith.
Fieri facias, cause to be made.
Fillus nullius, the son of no one.
Firma, rent; land rented; a farm.
Firmarius, a hirer of land; a farmer.
Flagellis et fustibus acriter verberare, with whips and rods severely beat.
Foemina viro coöperta, a woman entirely covered by a man.
Frank tenement, free holding.
Fructus, industriales, naturales, fruits, of industry, natural.
Habeas corpus, ad faciendum, subjiciendum et recipiendum; ad testificandum, have the body, for doing, submitting to and receiving; for testifying.
Habere facias, possessionem, seizinam, cause [him] to have, possession, seizin.
Haec est finalis concordia, this is the final agreement.
Haeres, heres, heir.
Haereditas, hereditas, inheritance; estate of a deceased person.
Homagium, manhood, homage.
Hostis humani generis, an enemy of the human race.
Id certum est, quod certum reddi potest, that is certain, which can be made certain.
Ignoramus, we do not know.
Ignorantia legis neminem excusat, ignorance of the law excuses no one.
Imparl, talk with.
In bonis, among [his] goods (property.)
In capita, among heads (individuals.)
In capite, in chief.
Indebitatus assumpsit, being indebted he undertook (promised.)
In extenso, in full.
In facie ecclesiae, in the sight of the church.
In fictione juris semper existit equitas, in a fiction of law there is always equity.
Infra maenia, within the walls.
Infra praesidio, within [its] protection.
In genere, in kind.

In gremio legis, in the lap of the law.
In haec verba, into these words; in the same words.
In infinitum, to infinity; without end.
In integrum, into [his] original condition.
Injuria, injury, wrong.
In libera eleemosyna, in free alms.
In libero maritagio, in free (frank) marriage.
In loco parentis, in the place of a parent.
In manu, in hand.
In mora, in delay.
In mortua manu, in a dead hand.
In nubibus, in the clouds.
In pais, in [the] country.
In pari delicto, potior est conditio defendentis, in equal fault, stronger is the position of the defendant.
In pari materia, in the same (similar) matter.
In personam, certam sive determinatam, against a person, certain or determinate.
In pios usus, to pious uses.
Inquisitio post mortem, an inquiry after death.
In re, in a thing; in the matter.[of.]
In rem, against a thing.
In specie, specifically, individually.
Interesse termini, an interest in the term.
Interest reipublicae ut sit finis litium, it is for the interest of the community that there be an end of law suits.
Inter vivos, between living persons.
In transitu, in transit.
In ventre sa mere, in the belly [of] its mother.
In withernam, in reprisal.
Jeo faile, I am mistaken.
Jura, (plural of *jus*,) see *Jus*.
Jurat, he swears.
Jurata, juratares, the jury, jurors (persons who swear.)
Jure gentium, by the law of nations.
Jure proprietatis, by the right of ownership.
Jurisconsulti, [persons] learned in law.
Juris et seizinae conjunctio, the conjunction of right and seizin.
Jus, law; right.

Jus accrescendi, inter mercatarum locum non habet, the right of accession (survivorship), among merchants has no place.
„ *ad jus in re acquirendum,* a right to acquire a right in a thing.
„ *civile,* the civil law.
„ *duplicatum,* a double right.
„ *gentium,* the law of nations.
„ *in re alieno,* a right in a thing of another's.
„ *mercatorium,* the mercantile law.
„ *naturae, naturale,* law of nature, natural.
„ *non scriptum,* unwritten law.
„ *personarum,* law of persons.
„ *quiritium, quiritarium,* law of the Quirites, quiritarian.
„ *rerum,* law of things.
„ *scriptum,* written law.
„ *tertii,* the right of a third [person.]
Κανών, (kanon, canon), a rule.
Laches, neglect; negligent omission.
Latiori sensu, in the wider sense.
Latitat, he is lurking.
Latrocinium, robbery, roguery; (theft, larceny.)
Levant and couchant, rising and lying down.
Levari facias, cause to be levied.
Leges (plural of *lex*;) see *Lex.*
Lex, law.
Lex fori, the law of the forum (place of trial.)
„ *loci contractus, celebrationis,* the law of the place, of the contract, of the celebration.
„ *mercatoria,* the mercantile law.
„ *non scripta,* unwritten law.
„ *scripta,* written law.
Liberum tenementum, a free holding, freehold.
Lis pendens, a pending suit.
Literae, clausae, patentes, a letter (letters), open, close.
Locatio et conductio, letting and hiring.
Locus sigilli, the place of the seal.
Lucrum cessans, gain ceasing.
Magna carta, the great charter.
Magnum concilium, the great council.
Mainour, things in hand.
Mala fides, fide, bad faith, in bad faith.

Malum (mala), in se, [*quia*] *prohibitum (prohibita),* wrong, in itself, [because] forbidden.
Mandatum, mandate.
Mandamus, we command.
Manerium, a manor.
Manucaptio, taking by hand.
Maritagium, marriage.
Mens rea, a guilty mind.
Mesne, intermediate.
Mespris, contempt.
Mirrour aux Justices, Mirror for Justices.
Mittimus, we send.
Modus acquirendi, way of acquiring.
„ *decimandi,* manner (measure) of taking tithes.
Moliter manus imposuit, gently laid hands on [him.]
Monstrans de droit, showing of right.
Mort d'ancestor, death of ancestor.
Mortis causa, because of death.
Municipium, a municipality.
Murdrum, murder.
Narratio, a statement.
Nativi, natives (*i.e.* born to their status.)
Natura Brevium, The Nature of Writs.
Ne exeat, regno, republica, [that] he do not go out, of the kingdom, of the republic.
Negotiorum gestor, a bearer of affairs.
Ne injuste vexes, do not unjustly annoy.
Neint culpable, not guilty.
Nemo est heres viventis, no one is the heir of a living [person.]
„ *potest exuere patriam,* no one can cast off his country (nationality.)
Nil debet, he owes nothing.
Nisi, prius, unless, before.
Nom de plume, pen name.
Non assumpsit, he did not undertake (promise.)
„ *cepit,* he did not take.
„ *compos mentis,* not master of [his] mind.
„ *culpabalis,* not guilty.
„ *detinet,* he is not detaining.
„ *est factum,* it is not [his] deed.
„ „ *inventus,* he has not been found.

Non obstante veredicto, notwithstanding the verdict.
„ *sui juris*, not of his own law.
Noscitur a sociis, [he] is known by [his] associates.
Novatio, novation.
Novus actus interveniens, a new act coming between.
Nudum pactum, a bare pact, a nude pact.
Nul disseizin, no disseizin.
Nullum tempus occurrit regi, no time runs against the king.
Nul tiel record, [there is] no such record.
„ *tort*, no wrong.
Obiter dicta, sayings by the way.
Obligatio, obligationes, obligation, obligations.
Omnis ratihibitio retrotrahitur et mandato aequiparatur, every ratification has a retroactive effect and is equivalent to a command.
Ouster le main, removing the hand.
Pactum, a pact.
Paravail, for profit.
Parens patriae, parent of the country.
Pares, equals, peers.
Parol, oral.
Particeps criminis, a participator in a crime.
Peine fort et dure, pain strong and hard.
Pendente litè, pending the suit.
Per annum, by the year; annually.
„ *anum*, by the anus.
„ *capita*, by heads (individuals.)
„ *industriam hominis*, by the industry of man.
„ *infortuniam*, by misfortune (accideut.)
„ *my et per tout*, by a part and by all.
„ *orem*, by the mouth.
„ *pais*, by [the] country.
„ *quod, servitium (consortium) amisit*, whereby, he has lost the service (companionship.)
„ *se*, by itself, of itself.
Persona, ecclesiae, a person, of the church.
Per servitium militare, by military service.
„ *stirpes*, by stocks.
„ *testes*, by witnesses.
„ *tout*, by the whole.

Per verba, de presenti, de futuro, by words, relating to the present, relating to the future.
Petition de droit, petition of right.
Pie poudre, foot dust(?); pedlar(?).
Pignus, pawn.
Plebicita, decrees of the people.
Plene administravit, he has fully administered.
Pone, put.
Posse comitatus, the power of the county.
Postea, afterwards.
Praecipe, quod reddat, command, that he give back.
Praemoneri, praemunire, to be forewarned.
Praetor, a high officer at Rome.
Predium, non persona, servat, the land, not the person, serves (is subject to the burden.)
Presumptio, facti, juris, et de jure, a presumption, of fact, of law, and by law.
Prima facie, at first appearance.
„ *vestura,* the original clothing.
Privilegium, privilege, a private law.
Probator, one who proves.
Procedendo ad judicium, for proceeding to judgment.
Prochein ami, next friend.
Pro confesso, as confessed.
Proditio, treachery; treason.
Profert, he offers.
Profit a prendre, profit in taking.
Pro forma, in form; formal, formally.
„ *herede,* as an heir.
Propter impotentiam, privilegium, because of weakness, a special right.
Pro rata, itineris; proportionally, to the journey (voyage.)
„ *salute animae,* for the health of [his] soul.
„ *tempore,* for the time; temporary, temporarily.
Puis darrein continuance, since the last continuance.
Puisne, inferior.
Pur auter vie, for another life.
Quantum, how much; amount.
„ *meruit, valebant,* as much as he has deserved, they were worth.

Quare clausum fregit, whereby he broke [his] close.
„ *impedit*, whereby he is hindering.
Quasi, as if.
Que estate, whose estate.
Quia emptores, because buyers.
Quieta non movere, not to disturb [things that are] quiet.
Quieti reditus, quiet rents.
Quirites, spearmen (?); a name of the Roman people.
Qui tam, who as well.
Quod ei deforceat, that he is deforcing him.
„ *manus domini regis amoveatur, et possessio restituatur petenti; salvo jure domini regis*, that the hand of the lord king be removed, and possession restored to the petitioner, saving the right of the lord king.
„ *permittat prosternere*, that he permit to throw down (abate the nuisance.)
Quo minus, by which the less.
Quorum, of whom; a sufficient number to act.
Quo warranto, by what warrant.
Rapina, robbery.
Recordari facias, cause to remember; remiud, notify.
Reddendum, to be returned.
Reditus, siccus, something rendered (rent), dry.
Registrum Brevium, The Register of Writs.
Remisit curiam suam, has waived his court (jurisdiction.)
Replegiari facias, cause to be replevied.
Res, thing, property, matter, affair.
„ *adjudicata*, a matter adjudicated upon.
Rescuous, rescue.
Res ipsa loquitur, the affair itself speaks.
„ *nullius*, property of no one.
„ *perit domino*, the thing perishes for the owner.
Responsa prudentum, answers of the learned.
Restitutio in integrum, restoration to [his] original condition.
Rusticum judicium, a rustic judgment.
Scaccarium, the Exchequer.
Scandalum magnatum, slander of magnates.
Scienter, knowingly.
Scire facias, make [him] know.
Scutagium, shield money.

Secta, path, following; suit.
Secundum formam doni, according to the form of the gift.
Se defendendo, in defending oneself.
Sed quaere, but inquire [further] ; (*i.e.* it is doubtful).
Sic utere tuo, ut alienum non laedas, so use [that which is] your own, as not to harm [that which is] another's.
Similiter, likewise.
Si te fecerit securum, if he shall have made you secure.
Sive Commentarius Juris Anglicani, or a Commentary on English Law.
Soit droit fait al partie. let right be done to the party.
Son assault demesne, his own assault.
Stare decisis, to stand to [what has been] decided.
Stricto sensu, in the strict sense.
Sub poena, under a penalty.
Sui juris, of his own law.
Super se assumpsit, took upon himself; undertook.
Supersedeas, desist.
Super visum corporis, on view of the body.
Supplicavit, he has prayed.
Sur disclaimer, upon a disclaimer.
Sursum redditio, a rendering back.
Suspendatur per collem, let him be hanged by the neck.
Tales, such.
Tenendum, to be held.
Terrae dominicales, lands of the lord.
Terre tenant, land holder.
Terminus, limit, end, bound.
Testatum capias, [it has been] testified, take.
Titulus, title.
Toujours prist, always ready.
Tractatus de Legibus et Consuetudinibus Regni Angliae, Treatise on the Laws and Customs of the Kingdom of England.
Trouver, to find.
Uberrima fide, with the utmost [good] faith.
Ubi jus, ibi remedium, where [there is] a right, there [there is] a remedy.
Ultra vires, beyond the powers.
Uncore prist, still ready.
Unde nihil habet, whence [she] has nothing.
Universitas, juris, rerum, a totality, of right, of things.

Ut res magis valeat quam pereat, that the matter may [rather] be valid than fail.

Usucapio, acquisition by use.

Usus, use.

Usufructus, use [and] fruits.

Vadiatio, duelli, legis, wager, of battle, of law.

Valor maritagii, the value of the marriage.

Venditioni exponas, put up (expose) for sale.

Verbatim, word for word.

Veredictum, a true statement.

Veritatem dicere, to speak the truth.

Versus, against.

Verus heres, a true heir.

Vestimentum, a covering, a garment.

Vicarius, a substitute.

Vi et armis, with force and arms.

Villa, a country seat; a township.

Villani, persons belonging to a *villa* (?); vile persons (?)

Virtute officii, by virtue of [his] office; officially.

Vis major, superior force.

Vocatio, calling.

Voire dire, to speak truly.

Volenti non fit injuria, to a willing (consenting) [person] there is done no injury.

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